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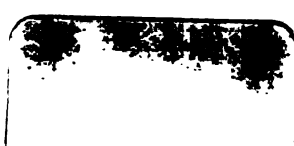


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REPORTS
OF
CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE
SUPREME COURT OF ILLINOIS.

VOLUME 303.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN APRIL AND
JUNE, 1922, AND CASES WHEREIN REHEARINGS WERE DE-
NIED AT THE JUNE AND OCTOBER TERMS, 1922.

SAMUEL PASHLEY IRWIN,
REPORTER OF DECISIONS.

BLOOMINGTON, ILL.
1922.

Entered according to Act of Congress, in the year 1922, by
SAMUEL PASHLEY IRWIN,
In the Office of the Librarian of Congress, at Washington.

DEC 21 1922.

Pentagraph Printing and Stationery Co
Printers, Stereotypers, Binders,
Bloomington, Ill.

JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

CLYDE E. STONE, CHIEF JUSTICE.

FLOYD E. THOMPSON, CHIEF JUSTICE.*

JAMES H. CARTWRIGHT,	}	JUSTICES.
WILLIAM M. FARMER,		
ORRIN N. CARTER,		
FRANK K. DUNN,		
WARREN W. DUNCAN,		
CLYDE E. STONE,		
FLOYD E. THOMPSON,		

ATTORNEY GENERAL,

EDWARD J. BRUNDAGE.

REPORTER OF DECISIONS,

SAMUEL PASHLEY IRWIN.

CLERK,

CHARLES W. VAIL.

*Mr. Justice Thompson became chief justice at the June term, 1922.



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PROCEEDINGS IN THE SUPREME COURT ON MEMORIAL TO
ILLINOIS LAWYERS WHO SERVED IN THE WORLD WAR.

On Monday, December 15, 1921, at nine o'clock A. M., which hour had been set apart for the purpose, the following proceedings were had:

MR. CHIEF JUSTICE STONE:

The court is advised that a motion is to be made this morning by Major Edgar B. Tolman, of Chicago, presenting a resolution adopted by the Illinois State Bar Association as a memorial to the Illinois lawyers who served the United States in the late war against the German empire. The court will hear the motion.

MAJOR TOLMAN:

May it please the court—I desire to offer the following motion:

"Now comes the Illinois State Bar Association, by Edgar Bronson Tolman, chairman of its committee on soldier memorials, and pursuant to a resolution of said Illinois State Bar Association moves the court that the names and biographies of those members of the Illinois bar who gave their lives in the war against the German empire, and the names and records of those lawyers who served in the army, navy or marine corps of the United States or their allies during the said war, be entered of record by the court as a tribute to their patriotism."

In support of this motion I beg leave to call attention to the peculiar relation which the lawyer bears to the judicial institution. Courts of justice were evolved for the purpose of putting an end to personal conflict between individuals and to establish the peace of the community by substituting the rule of justice for the rule of force. Modern civilization rests upon justice as its only sure foundation. Without it civilization would give way again to barbarism. It was soon learned that the magistrate alone was un-

equal to the task of adequately administering justice; that justice could not be assured until the magistrate had heard and considered all that could be said in support of the claim of each of the disputants; and that this could only be done by men learned in the law and skilled in its application. Thus it was that the lawyer came to be recognized as an officer of the court,—an indispensable part of the judicial institution, without whom that institution could not function. Even in the old days of barbarism, when the ultimate decision of all disputes was pronounced by the sword, the innate love of justice breathed into the heart of man by his Creator inspired the more noble-minded of the warriors, in an age when warfare was the highest profession of the day, to vow that they would draw the sword only in a just cause and to protect the weak and defenseless from injustice. Thus dawned the age of chivalry, which was the forerunner of the age of justice. In the new order there have always been lawyers, inspired by the spirit of the age of chivalry, who have devoted their lives to the cause of justice. Of such are those referred to in the pending motion.

The lawyer's training and the ideals of his profession enabled him, long before the great majority of our people knew what was really happening, to realize that the world war was a war which threatened the very existence of justice as a rule of conduct binding upon nations; that it must be resisted to the uttermost, and that our nation was no less imperiled than those heroic democracies who were then bearing the brunt of the battle. The great contribution of the lawyer to the victory which our nation so effectively helped to achieve was the part which he, the trusted adviser of his fellow-citizens, played in helping to bring about that marvelous accord without which the United States could not have waged war at all.

But we are not here to-day to celebrate the accomplishments of those who only helped with words, with ideas, with arguments. We are here to make a record of the names of those who did all that and more: who translated their convictions and their ardor into deeds; who laid aside the comforts of home, the enjoyment of congenial avocation, to take their places in the army or the navy of the United States. And more especially are we here to record the names of those who have not returned with the victorious divisions, but who in gallant and loyal service have laid down their

lives that liberty and justice should continue to be the supreme right of every man and every nation.

In view of the relations of the lawyer to the judicial institution, it has seemed to the Illinois State Bar Association appropriate that the services of the officers of this court in the great struggle for world justice should here be made a matter of record.

MR. CHIEF JUSTICE STONE:

The court appreciates the spirit which has prompted the State Bar Association in appointing this committee, and is in full accord with the resolution presented and the sentiments expressed by you, as chairman of the committee, in support of such resolution. Mr. Justice Carter will respond for the court.

MR. JUSTICE CARTER:

It is especially fitting that this resolution should be presented to the court for its records, to keep vivid the names of those who have made the supreme sacrifice "that government of the people, by the people, for the people, shall not perish from the earth," and the names of those who also went forth to give, if necessary, "the last full measure of devotion." Moreover, it is peculiarly appropriate that these memorial services should be held to-day in the presence of these young men and women who are about to enter the portals of the legal profession, to aid in impressing upon them the fact that the practice of the law is not a mere business,—a means to an end; that they are not following it solely to make a living, but because they believe it is a great profession. It will emphasize the great truth that to attain the fullest and best success in law one must not only have ideas but ideals, and must live up to those ideals as did those men who, in memory or in person, we meet here to-day to honor. Those who died have demonstrated in reality the truth of the sentiment that

"We live in deeds—not years; in thoughts—not breaths;
In feelings—not in figures on a dial.
We should count time by heart-throbs. He most lives
Who thinks most, feels the noblest, acts the best."

These men will ever be remembered. They did not live long, as we usually measure life's span, but their lives were full and

complete. While their material selves have vanished from our sight, the better part of them will remain with us to cheer and encourage. "To live in hearts we leave behind is not to die." Their names cannot be forgotten. They will be embalmed in art and remembered in song and story as long as our nation exists.

With high pride we to-day receive from the bar association, through you, Major Tolman, this memorial, containing the names of our comrades, living and dead, who thus answered their country's call, and it is with deepest gratitude that we are privileged to preserve here in our records, in a permanent memorial, the names of these, our honored and sacred dead.

Mr. CHIEF JUSTICE STONE:

Believing and recognizing, in common with the people of the State of Illinois and true American citizens everywhere, the deep sense of appreciation and gratitude for the noble service and sacrifice of those whose names are here presented, it is the order of the court that this memorial be received and spread of record and that this court stand in recess until ten o'clock A. M. to-day.

Following is a list of the names of the Illinois lawyers who lost their lives in the service of the United States,—in the army, navy or marine corps:

HENRY G. ARENDS.—First Lieutenant, Company C, 119th infantry, 30th division. Died October 25, 1918, from wounds received in action in Flanders.

EDWARD BARRY.—Corporal, Company K, 354th infantry, 89th division. Killed in action near Bois de Barricourt, November 1, 1918. Distinguished service cross.

LESTER CLEMENT BARTON.—Second Lieutenant, Battery B, 101st field artillery, 26th division. Killed in action in Belleau Wood, July 18, 1918.

JAMES GEORGE BROPHY.—Second Lieutenant, Company E, 360th infantry, 90th division. Died on September 28, 1918, at base hospital No. 51, from wounds received in action during the St. Mihiel offensive.

LOUIS MASON BRUCH.—Lieutenant, 91st U. S. aero squadron. Killed in air combat November 10, 1918, at Inor-sur-Meuse.

EMIL J. COHEN.—Captain, Company I, 45th infantry, 9th division. Died of influenza at Camp Sheridan, Alabama, on October 20, 1918.

ELMER TIFFANY DOOCY.—First Lieutenant, Company M, 168th infantry, 42d division. Killed in action during St. Mihiel offensive, September 12, 1918. Distinguished service cross.

ADRIAN C. EDWARDS.—First Lieutenant, machine gun company, 18th infantry, 1st division. Killed in action on May 4, 1918.

ROBERT HARLAN FLANSBURG.—Lieutenant, U. S. A. Killed in action in the Toul sector, June 16, 1918. Croix de Guerre.

JASPER J. FFRENCH.—Lieutenant, aviation service. Killed October 15, 1918, at Paine Field, Mississippi.

CHARLES A. GARDINER.—Private, Receiving Company 31, Q. M. C., Camp Johnston, Florida. Died January 14, 1918.

ISRAEL F. GOLDBERG.—Sergeant, Company I, 38th infantry, 3d division. Killed in action at the second battle of the Marne, on July 15, 1918.

HARRY EUGENE HACKETT.—Captain, 131st infantry. Killed at Chipilly Ridge, August 9, 1918. Distinguished service cross.

PAUL COOK HURLBURT.—First Lieutenant, Company M, 28th infantry, 1st division. Killed in action in the Argonne offensive, on October 2, 1918.

CLARENCE ELMO JAMISON.—Sergeant, 21st training battery, Central Officers' Training School. Died of pneumonia at Camp Taylor, Kentucky, October 15, 1918.

FRANK M. JORDAN.—First-class private, Company H, 358th infantry, 90th division. Died from wounds on November 19, 1918, at Savenay, France.

LINDOLPH RILLIS KERLEY.—First Lieutenant, 119th field artillery. Killed in a railroad wreck near Blois, France, December 5, 1918.

THOMAS CANNON LYONS.—United States navy, died at Washington, D. C., March 28, 1918.

ARTHUR H. MAGNUSSEN.—Lieutenant, unit No. 14, base hospital. Died at Savenay, France, February 14, 1919.

JOEL F. McDAVID.—First Lieutenant, aviation section. Killed in accident at Buc Field, France, on October 12, 1918.

BERNARD F. McMEEL.—Second Lieutenant, Company F, 9th infantry, 2d division. Killed in action in the second battle of the Marne, on July 18, 1918.

AMIL R. MESSELHEISER.—Second Lieutenant, 76th field artillery, 3d division. Died at base hospital No. 88, Langres, France, on December 10, 1918, from wounds received in action.

RICHARD T. MUNZER.—Captain, motor truck division, Q. M. C. Died of pneumonia, October 6, 1918, at La Havre, France.

FRANK P. NAVAGATO.—Second Lieutenant, Judge Advocate's department. Died at Washington, D. C., October 9, 1918.

NORMAN PRINCE.—Second Lieutenant, Lafayette Squadron, French aviation service. Died of injuries October 15, 1916, at Gerardmer, France. Croix de Guerre, Medaille Militaire, and Legion d'Honneur.

CURTIS G. REDDEN.—Lieutenant-Colonel, 149th field artillery, 42d division. Died in Coblenz, Rheinprovinz, January 16, 1919.

LINUS C. RUTH.—First Sergeant, Company B, 131st infantry. Died September 20, 1918, from wounds received at Chipilly Ridge.

ERNEST M. STEPHENS.—Sixth Battery, 2d O. R. T. C. Killed in an accident at Fort Sheridan, Illinois, on September 17, 1917.

MARTIN M. WEISS.—Company C, 4th infantry. Killed in action on October 22, 1918.

WILLIAM E. WHEELER, III.—First Lieutenant, 19th infantry. Died of influenza at Camp Travis, Texas, October 20, 1918.

AMOS BRADFORD WHITTLE.—Lieutenant, aviation service. Killed at Rockwell Field, California, September 13, 1918.

EDMUND W. SUTHERLAND.—161st Depot Brigade, 2d Company, Camp Grant. Died of influenza October 7, 1918.

EDWARD J. VEASEY, JR.—Lieutenant, Company F, 168th infantry, 42d division. Died on July 16, 1918, at Ecury-sur-Coulee, from wounds received in action.

HORACE EWING WILGUS.—Company A, 329th machine gun battalion. Died of influenza, February 13, 1919.

TRACY POND WILKINS.—Company D, 122d infantry. Died at Camp Mills, Long Island, of influenza and pneumonia, October 11, 1918.

LLOYD GARRISON WILLIAMS.—First Lieutenant, Company K, 28th infantry, 1st division. Died of pneumonia, November 26, 1918, at Nantes.

LAWRENCE J. WOLPERT.—United States naval reserve force. Died of pneumonia, October, 1918.

To the above names the reporter, upon his own responsibility, desires to add that of Lieutenant Andrew K. Dunn, only son of Mr. Justice Dunn, of this court. Andrew enlisted while attending Harvard University, trained at Plattsburg, and after receiving his degree at Harvard was stationed at Camp Devens, Massachusetts, until sent overseas. He was killed very shortly after going over the top at the

battle of St. Mihiel, on September 12, 1918. He was attached to a Texas regiment at that time, so this is the only opportunity afforded to honor his memory as an Illinois soldier.

The following are the names of the Illinois lawyers who served the United States in the army, navy or marine corps, so far as obtainable by the committee:

Aaron, Ely M., Chicago	Bailey, Harry P., Chicago
Abbott, Edwin H., Chicago	Baird, Forest G., Galesburg
Adams, Edward R., Chicago	Baker, Charles F., Evanston
Adams, Robert M., Chicago	Ballard, Ernest S., Chicago
Adelsdorf, Sam L., Chicago	Banes, Stanley W., Chicago
Ahlberg, Albin C., Chicago	Baranicik, Maurice A., Chicago
Albert, William M., Vandalia	Barce, Arthur U., St. Louis, Mo.
Albright, Charles D., Chicago	Barnard, Bernard, Chicago
Aldenderfer, F. W., Chicago	Barnes, Maurice E., Havana
Alexander, Marks, Quincy	Barth, William P., Rock Island
Allen, John O., East Moline	Bartlett, Frank D., Chicago
Allison, David, Danville	Bartley, James V., Joliet
Altenburg, Walter P., Oak Park	Baskin, Albert, Chicago
Altphilisch, Wilbur J., Chicago	Baskin, Barron H., Chicago
Anderson, Carl H., Chicago	Bauer, George H., Effingham
Anderson, Eris L., Chicago	Beacom, Harold, Chicago
Anderson, John L.	Beal, Dwight E., Bloomington
Anderson, William E., Chicago	Beam, Harry P., Chicago
Andrews, Roscoe C., Chicago	Becker, Isador, Chicago
Aplington, William J., LaSalle	Beckwith, John W., Chicago
Appel, Vallee O., Evanston	Bederman, Edwin B., Chicago
Arber, Frederick V., Peoria	Bell, Benjamin S., Rock Island
Arnfield, P. Fremont, Chicago	Bell, Vincent A., Fulton
Arnold, Thurman W., Chicago	Belnap, Noel D., Chicago
Arnston, Otto A., Chicago	Benjamin, Fred P., Watseka
Augur, Wheaton, Chicago	Benjamin, H. H., W. Chicago
Austin, Edwin C., Chicago	Benson, Emil J., Batavia
Austin, John L., Chicago	Bentley, Richard, Chicago
Austin, R. C., Joliet	Berger, Charles, Chicago
	Berghoff, Lewis W., Chicago
Babcock, Harry A., Chicago	Berry, George A. Jr., Chicago
Bach, Louis E., Bloomington	Berter, Carl B., Quincy
Bacharach, L. Sidney, Dixon	Bettledorf, Peter H., Chicago
Bachrach, Arthur C., Chicago	Bibo, E. J., Paris
Bagley, Frank, Chicago	Bierma, Harry, Chicago
Bailey, Clinton S., Chicago	Bierman, C. C., Sangamon Co.

Billman, Elliott, St. Clair Co.
 Bingham, Halsey, Peoria Co.
 Birkland, John O., Chicago
 Blair, Henry A., Chicago
 Blanchard, Paul E., Chicago
 Blanding, Virgil L., Springfield
 Bleisch, Selmar A., Edwardsville
 Blim, Charles H., Joliet
 Bluhm, Maurice L., Chicago
 Blumenthal, Barre, Chicago
 Blumenthal, Louis N., Chicago
 Blumenthal, Sol, Chicago
 Boddie, John B., Chicago
 Boerger, Walter, Chicago
 Boettcher, Arthur H., Evanston
 Boetto, P. Francis, Joliet
 Bogolub, Herman L., Chicago
 Bohm, Alvin C., Edwardsville
 Boley, Roy E., Olney
 Boller, George W., Chicago
 Bolton, Joseph V., Chicago
 Bosser, Alfred C., Chicago
 Bowe, Wm. J., Chicago
 Bowen, Fred H., Chicago
 Boye, Walter F., Vandalia
 Boynton, Ben B., Springfield
 Boynton, William P., Alton
 Boys, John E., Chicago
 Braasch, George H., Chicago
 Bradbury, William E., Robinson
 Bradley, Charles D., Chicago
 Bradley, Lloyd M., Carbondale
 Bradley, Tobias E., Peoria
 Brady, Bruce B., Monmouth
 Bragdon, M. C. Jr., Chicago
 Brannon, H. F., Peoria
 Braude, Jacob M., Chicago
 Bremer, Louis J., Danville
 Bremner, Joseph E., Chicago
 Brewer, Leo, Chicago
 Bristow, George W., Paris
 Briggs, Warren, Chicago
 Britton, J. Hays, Rock Island
 Browder, Clifford H., Chicago
 Brown, Arthur V., Chicago
 Brown, Charles F., Chicago
 Brown, Frederick A., Chicago
 Brown, J. H., Chicago
 Brown, Jesse R., Alton
 Brown, Milton A., Chicago
 Bruce, Ray F., Chicago
 Brundage, Howard A., Chicago
 Bryant, Howard B., Chicago
 Bubacz, S. Charles, Chicago
 Buchanan, Wilber L., Chicago
 Buckley, John M., Amboy
 Buckley, Warren B., Chicago
 Bulger, John C., Chicago
 Bullington, Henry W., Hillsboro
 Bullington, John J., Belleville
 Burdick, Paul H., Chicago
 Burke, John A., Chicago
 Burke, Joseph, Chicago
 Burnham, Arthur W., Chicago
 Burns, C. A., Pontiac
 Burns, James T., Kankakee
 Burns, Owen M., Danville
 Burns, William F., Chicago
 Burton, C. W., Edwardsville
 Bush, Louis B., Chicago
 Bushonville, Leslie F., Chicago
 Butler, Comfort, Alexander Co.
 Butler, George E., McLean Co.
 Butter, L. R., Chicago
 Byrne, John F., Chicago
 Caldwell, Louis G., Chicago
 Callahan, M. L., Bloomington
 Campbell, Donald, Evanston
 Canaday, Warren, Hillsboro
 Cannady, Will M., Paxton
 Carey, Wm. P., Rockford
 Carlson, George M., Chicago
 Carlson, Martin A. W., Chicago
 Carlson, Reuben B., Chicago
 Carlstrom, Oscar E., Aledo
 Carnahan, Roscoe J., Freeport
 Carpenter, Guy, Chicago
 Carter, Ray, Danville
 Carton, Alfred T., Chicago
 Cartwright, Jas. H. J., Chicago
 Carynski, Stephens R., Chicago

- Casey, Thomas W., Chicago
 Cashen, John F. Jr., Chicago
 Cassels, Edwin H., Chicago
 Cassidy, Holland M., Chicago
 Castagnino, John A., Chicago
 Cavanaugh, Bert M., Carthage
 Chadwick, Perry M., Tuscola
 Champion, Edwin V., Peoria
 Chapin, Roger E., Springfield
 Chayes, Edward, Chicago
 Cherry, Michael J., Chicago
 Chipperfield, Burnett M., Canton
 Choisser, William C., Benton
 Churan, Rudolph J., Chicago
 Church, Claude R., Chicago
 Cisna, Charles G., Peoria
 Clark, J. Stewart, Macoupin Co.
 Clark, Melville W., Rockford
 Clark, Will H., Chicago
 Clark, William J., Chicago
 Cleland, DeWitt, Chicago
 Clemens, C. Latowski, Chicago
 Clements, Olen R., Marshall
 Clinnin, John V., Chicago
 Cody, Edward S., Chicago
 Cohen, Lawrence A., Chicago
 Cohn, Eugene R., Chicago
 Cohn, Herman H., Springfield
 Colby, Richard H., Chicago
 Coleman, James L., Chicago
 Collins, R. Robert, Chicago
 Collins, Charles, Chicago
 Colson, Robert J., Chicago
 Concannon, M. B. J., Chicago
 Conder, Conn L., Pekin
 Conglis, Nicholas P., Chicago
 Conley, Clarence O., Golconda
 Cook, Ralph, St. Clair Co.
 Cook, Stanley W., Chicago
 Cooke, Edwin H., Bloomington
 Cooke, Wilbur R., Chicago
 Coon, Claude H., Chicago
 Coon, Owen L., Chicago
 Coppinger, L. B., Alton
 Corbly, Lynn S., Champaign
 Costello, John W., Chicago
 Cotton, Robert F., Tuscola
 Couchman, Heber E., Chicago
 Coughlin, James J., Chicago
 Covey, Edwin L., Peoria
 Cowing, Glen L., Joliet
 Cox, Manford E., Robinson
 Craig, Donald B., Coles Co.
 Crain, Paul, Christopher
 Crayton, Charles M., Danville
 Crews, Ralph, New York City
 Croarkin, Paul C., Chicago
 Cross, Edmund J., Chicago
 Cross, Harvey B., Gary, Ind.
 Crow, William R., Chicago
 Crowe, DeWitt, Sangamon Co.
 Crowell, Solon W., Oregon
 Cummins, Wesley E., Cairo
 Cunningham, Charles M., Muskogee, Okla.
 Cunningham, Walter G., Pekin
 Curtis, S. R., Denver, Colo.
 Cuttone, Vito B., Chicago
 D'Autremont, R. C., Oak Park
 Daily, Francis L., Chicago
 Daly, Hugh J., Chicago
 Dall, Melville R., Chicago
 Dallstream, A. T., Centralia
 Daniels, Max, Chicago
 Darling, H. Maurice, Chicago
 Daugherty, Charles S., Chicago
 David, Louis D., Chicago
 David, Sigmund W., Chicago
 Davidson, Samuel E., Chicago
 Davis, Abel, Chicago
 Davis, Charles G., Geneseo
 Davis, Philip R., Chicago
 Dawson, Mitchell, Chicago
 Day, Clyde L., Chicago
 Day, Walter T., Springfield
 Dean, Franklin A. Jr., Chicago
 DeBoice, Benjamin S., Clinton
 Decker, Herbert, Chicago
 Deets, Edgar H., Chicago
 Defrees, Donald, Chicago
 Delahunty, Arthur F., Decatur

- Delana, Edward K., Chicago
 Delany, John B., Chicago
 DeMange, R. C., Bloomington
 Dennis, Albert E., Chicago
 Denton, Allen E., Chicago
 DeSouchet, William O., Chicago
 Dever, Daniel M., Chicago
 Dickenson, J. M. Jr., Chicago
 Dickerson, Charles, Chicago
 Dietrich, Norman, Chicago
 Dighton, John, Monticello
 Dix, Jesse W., Chicago
 Dixon, Sherwood, Dixon
 Dodd, Walter F., Chicago
 Doherty, W. M., St. Charles
 Dolan, Burtis J., Chicago
 Donigan, C. M., Chicago
 Donnelly, E. A., Bloomington
 Donovan, H. A., St. Clair Co.
 Donovan, Rupert D., Marengo
 Dormand, William L., Evanston
 Doty, Russell F., Chicago
 Dougherty, James L., Kankakee
 Douglas, Clarence H., Mattoon
 Downing, Toliver M., Macomb
 Downing, William P., Decatur
 Doyle, Ignatius C., Chicago
 Duncan, Albert G., Chicago
 Dunham, W. C., Collinsville
 Dunkelberg, Louis P., Pekin
 Durschlag, Max, Chicago
 Dusher, William R., Rochelle
 Duty, Delos L., Williamson Co.
 Duvall, Virgil H., Aledo
 Dwinell, Bruce E., Peoria
 Dyer, Charles F., Hoopeston
 Eagleton, Frank R., Robinson
 Early, Benjamin B., Rockford
 Early, John, Chicago
 Edgell, Fred I., Lincoln
 Edie, Burl A., Monticello
 Edmunds, Palmer D., Chicago
 Eggleston, Charles C., Toledo
 Eldridge, F. Howard, Chicago
 Elliott, Edgar L., Washington
 Elliott, Ivan A., Carmi
 Ellis, Howard, Chicago
 Ellison, Charles C., Alton
 Elmer, Clarence G., Lanark
 Emigh, Dwight K., Batavia
 Endicott, Cyril C., Carmi
 Ennis, Arthur I.
 Epstein, Samuel B., Chicago
 Erickson, Gustaf B., Joliet
 Evans, Donald, Peoria
 Evans, Donald L., Chicago
 Evans, John T., Chicago
 Ewen, John M. Jr., Chicago
 Fackler, Walter V., Chicago
 Faherty, Roger B., Chicago
 Fairweather, James, Chicago
 Falder, Leland E., Chicago
 Faletti, Michael J., Granville
 Falk, Lester L., Chicago
 Farmer, B. L., Chicago
 Farrar, Benj. D., Rock Island
 Farrell, Edward J., LaGrange
 Farthing, Chester H., Chicago
 Faulkner, J. W., Joliet
 Fekete, Thomas L., E. St. Louis
 Feldott, Joseph J., Batavia
 Fenlon, Lawrence J., Chicago
 Fernald, Robert W., Chicago
 Ferrenz, Tirrell J., Chicago
 Ferron, Eugene P., Elgin
 Fields, J. R., Madison Co.
 Figenbaum, T. R., Mattoon
 Filip, I. S., Chicago
 Finnegan, Thomas P., Chicago
 Fischer, Herman A. Jr., Wheaton
 Fisher, Guyon T., Chicago
 Fisher, John W., Chicago
 Fisher, Joseph, Chicago
 Fisk, Harris D., DeKalb
 Fiske, Kenneth M., Chicago
 Fitch, Joseph E., Chicago
 Fitzpatrick, A., Christian Co.
 Fitzpatrick, J. Ward, Chicago
 Flack, Charles E., Macomb
 Flaherty, William J., Chicago
 Fleming, Charles W., Danville
 Fletcher, Charles H., Mattoon

- Flood, Frank L., Morris
 Flory, Roger V., Chicago
 Flota, Charles T., Harrisburg
 Floyd, Luke A., Akron, Ohio
 Folonie, Hendrik, Chicago
 Foreman, Milton J., Chicago
 Foss, Martin H., Chicago
 Foster, John, Chicago
 Fowler, C. H., Socorro, N. M.
 Fowler, William H., Chicago
 Freels, Jno. W., St. Clair Co.
 Freidman, Sam, Chicago
 Friedman, Emanuel A., Madison
 Friedrich, Wm. R., Naperville
 Frizzell, H. P., Johnson Co.
 Fullerton, Charles B., Chicago
 Fuqua, Okel S., Waukegan
 Furrow, Elmer O., Danville
- Gabler, Joseph, Chicago
 Gale, Edward E., Peoria
 Gallagher, William H., Chicago
 Gallimore, Hal G., Carterville
 Gardiner, Charles A., Chicago
 Garey, Earl J., Chicago
 Garrett, Ray, Chicago
 Garriott, John C. Jr., Chicago
 Gatenbey, Andrew W., Chicago
 Gavin, John E., Chicago
 Geers, Cyrus A., Edwardsville
 Geers, Mark L., Edwardsville
 Geister, Edward A., Elgin
 Gemmill, William B., Chicago
 George, Elvin D., Staunton
 George, Leslie G., Edwardsville
 Gevirtz, Maurice, Chicago
 Gibbons, Harry, Chicago
 Gilbert, Allan T., Chicago
 Gilbert, Charles S., Chicago
 Gilbert, James H., Mt. Vernon
 Gillespie, George M., Springfield
 Gilroy, Francis R., Chicago
 Ginnaven, G., Sangamon Co.
 Gishwiller, Daniel S., Lena
 Gissel, Bernhard, Chicago
 Gkiverm, Rodney C., Chicago
 Glassner, James J., Chicago
- Glover, Clarence W., Chicago
 Glover, Rodney, Chicago
 Goldberger, Harold J., Chicago
 Goldenson, Abner, Chicago
 Golding, Robert N., Evanston
 Goldstein, Benjamin F., Peoria
 Gordon, Albert E., Chicago
 Gorey, E. J., Joliet
 Gorey, Thomas V., Joliet
 Gould, Ralph E., Chicago
 Grace, Wm. J., Chicago
 Graham, Leroy, Aurora
 Graham, James P., Chicago
 Graham, Robert E., Chicago
 Grammer, Albert E., Wolf Lake
 Gray, Vandroff, Chicago
 Gear, George H., Chicago
 Greathouse, Joseph F., Chicago
 Green, Charles P., Henry
 Green, Hugh, Jacksonville
 Green, L. M., Rockford
 Green, Maurice J., Chicago
 Green, Norman C., Chicago
 Gregory, Tappan, Chicago
 Griffith, R. W., Granite City
 Grossman, Edgar C., Belleville
 Grossman, Irwin, Chicago
 Grossman, Walter G., Belleville
 Grotefeld, H. A., Downers Grove
 Groth, A. William, Chicago
 Gueltig, C. E., Edwardsville
 Guerin, M. E., Washington, D. C.
 Guerine, Guy C., Melrose Park
 Guinan, James J., Chicago
 Gunnell, J. Myers, Chicago
 Gunnell, Palmer M., Chicago
 Gustin, Alpheus, Harrisburg
 Gustin, R. V., St. Clair Co.
 Guthrie, S. Ashley, Riverside
- Hackman, Logan F., Sparta
 Hagberg, John S., Chicago
 Haley, Robert E., Joliet
 Hall, Albert L., Waukegan
 Hall, James P., Chicago

- Halligan, Edwin A., Chicago
Halsted, Jesse, Riverside
Hamilton, Edwin J., Chicago
Hana, Leo G., Chicago
Hann, William E., Chicago
Hannah, Harry I., Mattoon
Hansen, Alvin L., Chicago
Hansen, George W., Chicago
Hanson, Harry C., Geneva
Harn, Jerry A., Galesburg
Harned, Harry S., Chicago
Harp, Hal D., Clinton
Harper, Paul V., Chicago
Harper, Robert H., Chicago
Harris, Ewart S., Chicago
Harris, William R., Macomb
Harrison, Frank J., Streator
Hart, John P., Batavia
Hartman, Frank R., Chicago
Hartsburg, Fred W., Aurora
Hartzell, Franklin M., Carthage
Hassell, Albert, Chicago
Hassell, Paul, Chicago
Hassmann, Walter E., Chicago
Hatch, Frank L., Springfield
Hawbaker, E. J., Monticello
Hawkins, Kenneth B., Chicago
Hayes, Edward A., Decatur
Hayes, Francis H., Chicago
Hayes, Herbert A., Carbondale
Healy, Paul J., Chicago
Heeren, Harry E., Chicago
Hefferan, W. S. Jr., Chicago
Heffernan, Ralph, McLean Co.
Helander, William E., Chicago
Henry, C. D. Jr., Kankakee
Henry, William C., Chicago
Henson, Ray D., Johnston City
Herman, Ladislas, Chicago
Heron, John, Chicago
Herr, William E., Chicago
Herr, Jesse J., Pontiac
Herrick, G. W., Farmer City
Herzog, Julius J., Chicago
Heyl, Harry C., Peoria
Hickman, Archie S., Paris
Hicks, Charles V., Chicago
Higgins, James E., Mt. Olive
Hiles, Perry H., Edwardsville
Hill, Melville C., Peoria
Hills, W. J., Benton
Hinshaw, Joseph H., Chicago
Hippler, C. Harold, Canton
Hirsch, Maxim, Chicago
Hirschl, Marcus A., Chicago
Hoban, Thomas J., Elgin
Hodges, Ernest S., Chicago
Hodgkins, Howard W., Chicago
Hoffman, Philip D., Chicago
Hogan, G. W. Jr., Lewistown
Holden, Sylvester E., Chicago
Holtgreve, Paul N., Peoria
Hoose, Oscar G., Bloomington
Hoover, Jose W., Chicago
Hoover, Loring R., Chicago
Horner, Louis C., Chicago
Horton, Eugene, Peoria
Horwich, David S., Chicago
Hosmer, H., Washington, D. C.
Hostetter, Earl D., Chicago
Hottinger, W. H. Jr., Chicago
Hough, Charles F., Chicago
Houghton, Fred B., Chicago
Howard, Hubert E., Chicago
Hudson, W. J., Yakima, Wash.
Hughes, Arthur J., Chicago
Hughes, John E., Chicago
Hull, Walker F., Rockford
Humphrey, R. R. Jr., Lincoln
Humphrey, Otis S., Springfield
Hutchinson, N. A., Chicago
Ince, Edward G., Chicago
Ingram, Henry J., Peoria
Ingram, J. E., Chicago
Irwin, Ormael B., Springfield
Iwert, William C., Oak Park
Jaccard, William N., Chicago
Jackson, Walter M., Chicago
Jacobson, Chester E., Chicago
Jadrich, Joseph, Lake County

- James, Maurice A., Chicago
 Jameson, John A., Santa Barbara, Cal.
 Jarnagin, Robert L., Shelbyville
 Jarosh, George O., Chicago
 Jarvis, Wm. B. Jr., Chicago
 Jefferson, Carl S., Evanston
 Jenkins, Newton, Chicago
 Jensen, Anker C., Kankakee
 Jerka, Daniel S., Chicago
 Jinkins, Samuel V., Danville
 Johnson, Carey R., Princeton
 Johnson, George W., Chicago
 Johnson, Glenn T., Chicago
 Johnson, Preston K., Belleville
 Johnson, Walter A., Aurora
 Johnson, Wm. H. A., Oak Park
 Johnston, Maurice B., Carlyle
 Jones, Charles E., Robinson
 Jones, Harley D., Chicago
 Jones, Gleonard H., Chicago
 Joslyn, David R. Jr., Woodstock
 Judah, Noble B. Jr., Chicago
 Judd, Willis W., Chicago
 Judson, Clay, Chicago
 Judy, William L., Chicago
 Juul, Herbert V., Chicago
- Kagy, John L., Salem
 Kahn, Harry A., Chicago
 Kane, Charles P., Bloomington
 Karraker, R. W., Jonesboro
 Kasserman, Homer, Newton
 Kauffman, Harlan B., Oregon
 Kavanaugh, Richard, Peoria
 Kavanaugh, Robert E., Peoria
 Kay, Wilfred S., Watseka
 Kearney, Marshall V., Chicago
 Keefe, Robert J., St. Clair Co.
 Keehn, Roy D., Chicago
 Keeney, Perry H., Chicago
 Keeney, Russell W., Naperville
 Kehoe, Louis J., Chicago
 Kelly, Charles B., Peoria
 Kelly, Fred H., Mattoon
 Kelly, Harry F., Ottawa
- Kelly, James R., Savanna
 Kelly, W. L., Shelby Co.
 Kendall, Abner F., Watseka
 Kennedy, Kaywin, Bloomington
 Kennedy, W. F., Chicago H'ts
 Kenshalo, D. R., Johnston City
 Keplinger, W. A., Chicago
 Kerman, George B., Macomb
 Kern, L. D., Sioux Falls, S. D.
 Kerr, H. T., Fairfield
 Kerr, Neil, Pontiac
 Kidder, Max, Monmouth
 Kiley, Leroy D., Chicago
 Kilgore, Reuben B., Danville
 King, Erman A., Cambridge
 King, Willard L., Springfield
 King, William H. Jr., Chicago
 Klarkowski, S. H., Chicago
 Klatzco, Harry, Chicago
 Klenk, Paul T., Blue Island
 Kline, Julius R., Chicago
 Klingler, Roland J., Chicago
 Kloska, Hugo T., Chicago
 Knight, Arthur J., Rockford
 Knight, C. D., Wheaton
 Knight, William D., Rockford
 Knoch, Wilfred G., Naperville
 Koenig, Paulus F. B., Chicago
 Komarek, Frank J., Cicero
 Kopald, Harry E., Chicago
 Korler, Sam, Chicago
 Kramer, Emanuel, Chicago
 Kramer, Leo J., Chicago
 Kramer, Max C., Chicago
 Kranzow, Roy L., Chicago
 Krebs, Wilbur E., Belleville
 Krinsky, Lazarus, Chicago
 Kruger, Irving L., Chicago
 Kudlick, Marion G., Chicago
 Kuflewski, T. F., Chicago
 Kuhns, Richard F., Chicago
 Kumler, Preston, Chicago
- Lambeau, Alfred O., Chicago
 Larimer, Joseph M., Chicago
 Larkin, Bernard J., Chicago

- Larkin, Joseph F., Chicago
 Larney, Edwin J., Chicago
 Latimer, Leslie, Chicago
 Lauher, Paul B., Paris
 Lavery, Paul E., Chicago
 Lavery, Urban A., Chicago
 Lawler, Joseph B., Chicago
 Lawless, Moran, Sangamon Co.
 Lawrence, John H., Chicago
 Lawson, James P., Chicago
 Lawyer, Joseph D., Chicago
 Lee, William H., Urbana
 Lelivelt, Joseph J., Chicago
 Lemen, Joseph J., St. Louis, Mo.
 Leopold, Roland E., Chicago
 Leve, Lee H., Chicago
 Levin, Samuel, Danville
 Levinkind, Morris, Chicago
 Levit, Lewis D., Chicago
 Levitan, Moses, Chicago
 Levy, David B., Murphysboro
 Levy, Richard C., Chicago
 Lewis, Arthur R., Anna
 Lewis, Daniel H., Chicago
 Lewis, Edward R., Evanston
 Lewis, H. F., Murphysboro
 Lewis, Leon L., Chicago
 Lewis, Loren B., Bloomington
 Lewis, Luther M., Chicago
 Lewis, Philip H., Lawrenceville
 Ley, James J., Joliet
 Liedel, Russell B., Springfield
 Liggett, Raymond, Peoria Co.
 Lind, Fred A., Chicago
 Lindahl, Harry C., Chicago
 Linderholm, Victor L., Chicago
 Lindstrand, Oscar, Chicago
 Linenthal, A. Charles, Chicago
 Litchfield, Herman, Waukegan
 Locke, Russell F., Chicago
 Loeb, Carroll S., Chicago
 Londrigan, J. A., E. St. Louis
 Loos, Karl D., Chicago
 Lord, C. J., Lincoln Parkway
 Lord, Maurice F., Aurora
 Loucks, Vernon R., Chicago
 Love, Wenzel J., Chicago
 Lucas, Ralph D., Chicago
 Lucas, Scott W., Havana
 Ludolph, Arthur L., Chicago
 Luney, Ray T., Freeport
 Lynde, Cornelius, Chicago
 Lynn, Walter F., Chicago
 Lyons, Frank, Chicago
 MacChesney, N. W., Chicago
 MacCracken, W. P., Chicago
 MacNeil, John A., Olney
 McArdle, Edward J., Chicago
 McCabe, William, Chicago
 McCaleb, Albert G., Chicago
 McCarthy, Emmett J., Chicago
 McCarthy, George C., Chicago
 McCarthy, John W., Chicago
 McCarthy, John V., Chicago
 McCarty, Donovan D., Olney
 McCarty, P. G., Crawford Co.
 McCauley, J. J., Woodstock
 McClane, James B., Chicago
 McClory, Theo. P., Chicago
 McClure, Lloyd M., Cass Co.
 McCord, Downer, Chicago
 McCord, E. O., Canton
 McCormick, Robert R., Chicago
 McCredie, James D., Aurora
 McCulloch, Hugh W., Chicago
 McDonald, John G., Chicago
 McDonald, George D., Chicago
 McDonnell, Frank A., Chicago
 McElwain, H. E. Jr., Chicago
 McGann, L. E. Jr., Oak Park
 McGaughey, G. E., Lawrenceville
 McGee, Leonard F., Chicago
 McGinnis, John F. Jr., Alton
 McGlynn, Jos. B., E. St. Louis
 McGlynn, Dan, Jr., E. St. Louis
 McGowan, Thomas N., Chicago
 McGrath, Thomas J., Chicago
 McGrath, Philip H., Chicago
 McIntosh, Loy N., Chicago
 McIntyre, Louis W., Chicago
 McKay, David D., LeRoy

- McKeon, James B., Chicago
 McKerchar, R. M., Chicago
 McKinney, Rudel, Peoria
 McLaughlin, Eugene D., Peoria
 McLaughlin, James A., Chicago
 McMahon, Martin C., Chicago
 McMahon, John J., Chicago
 McNabb, Duane, Chicago
 McNalley, Patrick H., Chicago
 McNamee, Peter F., Wilmette
 McPherson, Donald F., Chicago
 McWilliams, D. S., Chicago
 Mack, Edward, Carthage
 Mack, Louis W., Chicago
 Mack, Robert T., Chicago
 Mack, William J., Chicago
 Madden, John P., Gillespie
 Maddox, D. W., Hardin, Mont.
 Magill, Roswell F., Chicago
 Maguire, Fred V., Chicago
 Maher, Edward, Chicago
 Major, Joe, Hillsboro
 Malo, Stephen C., Watseka
 Manheimer, Arthur E., Chicago
 Mannon, Walter L., Aledo
 Markowitz, Maurice, Chicago
 Marks, George S., Chicago
 Marriott, Arthur C., Lombard
 Marshall, C. D., Rock Island
 Marshall, Thomas L., Chicago
 Marshall, Guy F., Rock Island
 Martin, Charles G., Chicago
 Martin, Edward S., Carthage
 Martin, William J.
 Martin, Joseph, Canton
 Marx, Solomon W., Chicago
 Mason, Frederick O., Winnetka
 Matheny, Willard R., Chicago
 Mathews, Robert E., Chicago
 Mathiesen, Thomas, Chicago
 Matz, Carl D., Chicago
 Maxwell, Stoy J., Crawford Co.
 Maxwell, Joseph D., Nashville
 Mayer, Edwin B., Chicago
 Mazurkiewicz, F. J., Chicago
 Mechem, John C., Lake Forest
 Mee, Edward, Sterling
 Mee, Thomas S., Sterling
 Mehrhoff, Loyal A., Winchester
 Meister, Edwin F., Douglas Co.
 Melaniphy, John C., Chicago
 Mendel, Claire, Chicago
 Merrick, Clinton, Evanston
 Merris, Byron M., Decatur
 Meserve, Theo., Lawrence Co.
 Mewhirter, David C., Yorkville
 Meyers, Erwin A., Chicago
 Meyers, Fred A., Vandalia
 Millar, Robert W., Chicago
 Miller, Albert G., Chicago
 Miller, Arthur L., Chicago
 Miller, Charles Y., Decatur
 Miller, John S. Jr., Chicago
 Miller, Louis P., Chicago
 Miller, Murray, Chicago
 Miller, Leland P., Lincoln
 Mills, Epler C., Virginia
 Mills, William A., Salem
 Milroy, Wm. J., Chicago
 Mishkin, Charles, Chicago
 Mishkin, Isadore T., Chicago
 Mitchell, J. K., Chicago
 Mitchell, Leon A., Chicago
 Mohan, Elmer J., Streator
 Morahn, Merritt D., Ottawa
 Morehouse, Nye F., Chicago
 Morgan, Stephen J., Chicago
 Morran, Mitchell, Chicago
 Morris, Eugene P., Watseka
 Morris, George M., Chicago
 Morrison, John E., Joliet
 Morrison, Donald T., Chicago
 Morrison, W. R., Champaign Co.
 Morton, Meyer, Chicago
 Moudry, Ladimir F., Sycamore
 Mourning, Paul W., Rushville
 Mumford, Barry, Pittsfield
 Munts, Arley, Ottawa.
 Murdock, Max, Streator
 Murphy, J. B., Bloomington
 Murphy, James D., Chicago
 Murphy, John K., Chicago

Murphy, Patrick J., Chicago
 Murray, Carl T., Chicago
 Muschler, Arthur F., Aurora
 Myer, Walter A., Chicago

Nafziger, Elmer, Springfield
 Nash, Robert E., Rockford
 Nathanson, Maurice J., Chicago
 Nelis, Clarence A., Chicago
 Nelson, Clarence E., Chicago
 Nelson, James S., Chicago
 Nelson, Walter R., Paxton
 Neunlist, Rollie E., Benton
 Nevins, Elbert K., Carlinville
 Nicholas, Henry C., Chicago
 Nichols, Halton L., Chicago
 Norris, Charles E., Chicago
 Nourie, Walter J., Kankakee
 Novotny, Joseph F., Chicago

Obenchain, Ralph R., Chicago
 O'Brien, L. Fred, Galesburg
 O'Brien, Vincent, Chicago
 O'Connell, George V., Chicago
 O'Connell, Harold P., Chicago
 O'Connell, R. M., Bloomington
 O'Conner, Charles A., Aurora
 O'Conner, Blanch A., Chicago
 O'Connor, Roderick H., Chicago
 O'Connor, Leslie M., Chicago
 Oehmke, M. F., E. St. Louis
 O'Hara, Barratt, Chicago
 O'Hare, Thomas J., Chicago
 O'Harra, Roswell R., Carthage
 Okin, Harry, Chicago
 O'Meare, Thomas J., Ottawa
 Orcutt, G., Pittsburgh, Pa.
 Orr, Pence B., Joliet
 O'Sullivan, Albert, Pulaski Co.
 O'Sullivan, Joseph, Pulaski Co.
 Otis, William K., Chicago
 O'Toole, Dennis J., Chicago
 Owens, Kent J., Sycamore

Pacey, Edward G., Paxton
 Paddock, George A., Chicago

Page, Charles D., Elgin
 Page, Gerald, Peoria
 Pallasch, Paul V., Chicago
 Pantelis, A. A., Chicago
 Parish, Cheaney L., Harrisburg
 Parker, Charles O., Cass Co.
 Parker, Harry D., Kankakee
 Parker, C. G., Chicago
 Parnass, Emanuel R., Chicago
 Parr, Clyde H., Macoupin Co.
 Patterson, Adams E., Chicago
 Pavlicek, C. B. Jr., Chicago
 Peacock, William R., Chicago
 Pearce, John I., Chicago
 Pearl, John F., Clinton
 Pearson, Oke L., Chicago
 Pease, Willard A., Chicago
 Pefferle, Leslie G., Springfield
 Peffers, John M., Aurora
 Peifer, Louis F., Chicago
 Pendarvis, Wilbur O., Peoria
 Perce, William D., Elgin
 Perel, Harry Z., Chicago
 Perrigo, Lyle D., Watseka
 Peterson, Abe R., Chicago
 Peterson, Francis W., Chicago
 Phillips, Carl E., Peoria
 Phillips, Charles, Christian Co.
 Pierce, Elbridge B., Chicago
 Pierce, Robert C., Chicago
 Pines, George S., Chicago
 Piszatowski, E. R., Chicago
 Plamondon, C. A. Jr., Chicago
 Plantz, Truman, Jr., Warsaw
 Platt, Casper, Danville
 Pool, Ernest H., Ottawa
 Poole, Clarence F., Chicago
 Poorman, Arthur G., Marshall
 Potts, George C., Chicago
 Poulton, Richard P., Chicago
 Pouse, Alfred H. W., McHenry
 Poust, Cassius, Sycamore
 Prather, Tirrie O., Rockford
 Prebis, Edward J., Chicago
 Price, B. M., Champaign Co.
 Pridmore, William T., Chicago

Pringle, Kenneth, Pike Co.
 Pritchard, Norman H., Chicago
 Pritzker, Harry N., Chicago
 Pritzker, Abram N., Chicago
 Pruitt, Raymond S., Chicago
 Purcell, Edward, Chicago
 Putnam, Floyd F., Canton

Quan, Michael J., Chicago
 Quay, Eugene, Chicago
 Quinn, James R., Chicago
 Quinn, Harry A., Chicago
 Quitman, Jesse, Chicago

Radnitzer, Adolph, Chicago
 Ramseyer, Roy A., Bloomington
 Rang, Carl K., Rockford
 Ratcliff, Glenn, Lewistown
 Reckhow, W. E., Rockford
 Redfield, Robert, Chicago
 Redman, Benjamin H., Paris
 Reece, George J., Chicago
 Reece, Leal W., Taylorville
 Reed, Chauncey W., Naperville
 Reed, Franklin N., Chicago
 Reeve, J. Fred, Chicago
 Regan, Richard H., Chicago
 Rehm, Roland C., Chicago
 Reilly, Thomas S., Chicago
 Reinhold, Louis S., Freeport
 Reker, George L., Chicago
 Remy, Victor A., Chicago
 Rennick, Frederick W., Buda
 Reno, Guy B., Rockford
 Reugg, Al G., Sangamon Co.
 Reynolds, Guy B., Chicago
 Richards, Robert W., Chicago
 Richie, Clark B., Hinsdale
 Richter, Edward L., Peoria
 Ricker, Joseph A., Chicago
 Riddle, Harry E., Bloomington
 Riely, Edward F., Minonk
 Rigby, Wm. C., Fort Sheridan
 Rinaker, T. K., Macoupin Co.
 Ritman, Hyman B., Chicago
 Roberts, Charles S., Chicago

Roberts, Ralph R., Sycamore
 Robertson, Egbert, Chicago
 Rock, William J.
 Rockwell, Louis, St. Charles
 Roemer, Erwin W., Chicago
 Rohn, William H., Chicago
 Rosenberg, Harry O., Chicago
 Rosengard, Myer N., Chicago
 Rosenthal, Samuel H., Chicago
 Rosin, Meyer W., Chicago
 Ross, Orville H., Chicago
 Rubenstein, Julius B., Chicago
 Rubinkam, Nathaniel, Chicago
 Ruel, Henry F., Kankakee
 Russell, Rayburn L., Pekin
 Rutledge, George F., Chicago
 Ryan, Joseph K., Chicago

Sabath, Sidney J., Chicago
 Sammon, Wm. A., Bloomington
 Schaffner, Margaret A., Chicago
 Scherwat, William C., Chicago
 Scheyer, Irving, Chicago
 Schmidt, Bernard J., Naperville
 Schradzki, Harold R., Peoria
 Schroder, Wm. B., Rock Island
 Schultz, Emil H., Chicago
 Schultz, Raymond H., Chicago
 Schuwerk, W. J., Evansville
 Schuwerk, Wm. H., Chester
 Schwartz, Edward H., Chicago
 Schwartz, Charles K., Chicago
 Schwarzenbach, Edgar H., East
 St. Louis
 Schweers, Lewis M., Chicago
 Scriven, Lloyd J., Dixon
 Scully, John C., Peoria
 Searcy, Evan L., Springfield
 Searing, John H., Carbondale
 Searle, John C., Rock Island
 Secgers, Edward A., LaGrange
 Segal, Israel E., Chicago
 Seidel, Charles G., Elgin
 Seidenberg, Nathan C., Peoria
 Seifried, Frederick C., Chicago
 Severin, William H., Chicago

- Sexton, William H., Chicago
Shanhause, Louis J., Rockford
Shapira, Rudolph, Chicago
Shaw, R. A. J., Chicago
Shaw, Joseph L., Geneseo
Shay, Wellington H., Streator
Sheller, Harold F., Dixon
Shepherd, A. Liddon, Chicago
Sheridan, James G., Chicago
Sheridan, Thomas H., Chicago
Sheridan, William J., Chicago
Shonts, Leroy C., Chicago
Shoop, Sidney A., Rockford
Shorey, Clyde E., Chicago
Shults, Carleton A., Aurora
Shupe, N. J., Chicago
Sickle, Max S. Jr., Chicago
Sidler, Hobart M., Chicago
Siebel, August F. W., Chicago
Sieberns, Lynn C., Gridley
Siebold, Clark L., Chicago
Silbert, David, Chicago
Silverstein, Harry A., Chicago
Simpson, Earl B., Eldorado
Sindlinger, Harvey, Dixon
Siqueland, Tryggve A., Chicago
Six, Rolla, Pike Co.
Skinner, Marion L., Princeton
Slade, John C., Chicago
Sladkey, Jerome J., Chicago
Slater, Clarence C., Chicago
Slusser, T. H., Norwood Park
Smith, Ashbel V., Waukegan
Smith, Cecil C., Chicago
Smith, Charles R., Chicago
Smith, Clarence P., Chicago
Smith, Earl J., Chicago
Smith, Hubert A., Chicago
Smith, June C., Centralia
Smith, John P., Chicago
Smith, John R., Lincoln
Smith, O. C., Benton
Smith, Paishe B., Chicago
Smith, Roy C., Aurora
Smith, T. B. F., Carbondale
Smith, William F., Clinton
Smith, W. M. P., Edwardsville
Snapp, Dorrance D., Joliet
Snider, Frederick W., Chicago
Snyder, Erwin P., Chicago
Snyder, George E., Chicago
Snyder, Ralph M., Chicago
Soble, Hirsch E., Chicago
Southworth, R. G., Chicago
Spence, James C., Chicago
Sperling, Harold G., Chicago
Springstun, Humphreys, Pana
Stansfield, James H., Chicago
Starrs, Albert L., Chicago
Staten, V. G., Hong Kong, China
Stelle, John H., McLeansboro
Stephens, Redmond D., Chicago
Stephens, Samuel J., Aurora
Sterchi, Frederick W. T., Olney
Stevens, Riley, Gilson
Stevens, R. L., Crawford Co.
Stewart, William S., Chicago
Stilwell, Abner J., Chicago
Stitt, Thomas L., Chicago
Stone, David G., Chicago
Strack, William N., Chicago
Strawn, Taylor, Chicago
Streeter, Harry S., Kankakee
Streeter, Wallace, Chicago
Strom, Alexander J., Belvidere
Strong, Arthur C., Urbana
Stroud, Ernest R., Effingham
Stucker, Urban L., Chicago
Sullivan, Frank W., Chicago
Sullivan, Michael J., Chicago
Summers, Arthur W., Eldorado
Swanson, Claude M., Paxton
Swanson, David I., Chicago
Sweitzer, Walter A., Chicago
Taber, David F., Chicago
Tait, Melville S., Chicago
Tarnopol, Emil, Chicago
Tauchen, John W., Chicago
Taylor, Elmer A., Watscka
Taylor, Orville J. Jr., Chicago
Taylor, Whitman, Wilmette

- Telford, Erastus, Salem
 Templeton, Stuart J., Chicago
 Tenney, Henry F., Chicago
 Tenny, Jacob L., Chicago
 Tetlow, James G., Rockford
 Thomas, H. Arthur, St. Louis
 Thomas, Lash, Chicago
 Thompson, Glenn, Chicago
 Thompson, Sam, Harrisburg
 Thornton, Randolph, Chicago
 Thorpe, F. A., Des Moines, Ia.
 Tolman, Edgar B., Chicago
 Townley, W. C., Bloomington
 Townsend, Russell E., Cobden
 Traxler, Dean L., Evanston
 Trimble, Perry D., Princeton
 Trimpe, Wm. A., Chicago
 Trunk, Francis F., Chicago
 Tucker, Heyman F., Chicago
 Tuttle, Oral P., Harrisburg
 Tyrrell, Thomas W., Chicago

 Ullmann, Frederic, Chicago

 Vail, Donald P., Chicago
 VanKeuren, J. G., Perry Co.
 VanMeter, James C., Mattoon
 VanSant, Nicholas G., Sterling
 Vedder, Beverly B., Chicago
 Vise, Isidore, Chicago
 Vogelsang, Clifford J., Pana
 Vonachen, Francis C., Peoria

 Wade, Walter A., Chicago
 Wahlheim, F. J., Presho, S. D.
 Waite, Raymond, Chicago
 Waldman, Charles, Chicago
 Walker, Walter G.
 Wall, Warner, Pulaski Co.
 Wallace, Henry L., Chicago
 Wallace, Russell G., Chicago
 Waller, James B., Chicago
 Walsh, James J., Chicago
 Walsh, Jas. Joseph, Chicago
 Walter, C. M., Sioux City, Ia.
 Walter, M. E., Galveston, Texas

 Ward, Harold G., Chicago
 Ward, Philip H., Sterling
 Ward, Thomas S., Chicago
 Warfield, William S., Chicago
 Warford, D. A., Elizabethtown
 Warner, R. L., Dixon
 Warner, Robert L., Dixon
 Wasson, James, Galesburg
 Watkins, Ferre C., Chicago
 Watson, G. W., Farmer City
 Watson, Joel F., Mt. Vernon
 Waugh, William F., Chicago
 Weaver, George C., Pittsfield
 Webber, Albert G. Jr., Decatur
 Weber, Elzie L., Lewistown
 Webster, H. L., Chicago
 Weese, Glenn W., Ottawa
 Wehenhoff, Merrill F., Sullivan
 Weichelt, Geo. M., Chicago
 Weidman, Harry S., Chicago
 Weisbrod, B. H., Chicago
 Weisenbach, Alfred, Chicago
 Weisenhorn, Paul G., Quincy
 Weiss, Edward W., Chicago
 Welch, Mathew L., Collinsville
 Weldon, T. S., Bloomington
 Welsh, Carlton K., Rockford
 Welsh, Vernon M., Chicago
 Westberg, Frank G., Chicago
 Westbrook, Ira E., Chicago
 Weston, Herbert M., Chicago
 Wham, Benjamin, Chicago
 Wham, Charles, Centralia
 Wheatley, W. W., Harrisburg
 Wheelock, John G., Quincy
 White, Edward H., Chicago
 Whiteside, Roy A., Moline
 Whitnel, Josiah, E. St. Louis
 Wiechert, R. W., Belleville
 Wigmore, John H., Chicago
 Wikoff, Howard H., Chicago
 Wilhelm, Forrest L., Ottawa
 Wille, Wm. H., Collinsville
 Williams, Ednyfed H., Chicago
 Williams, Homer H., Carthage
 Williams, Roy F., Chicago

Wilmeth, Delbert O., Chicago	Wright, D. Lester, Effingham
Wilson, Charles W., Chicago	Wright, Joseph H., Chicago
Wilson, Francis S., Chicago	Wright, Robert E., Greenville
Wilson, Rayburn H., Clinton	
Winston, Gerrard B., Chicago	Yetter, Percy M., Naperville
Wise, S. D., Harrisburg	Young, Eldon H., Chicago
Wolf, Walter B., Chicago	
Wood, William G., Chicago	Zdziabek, Sylvester, Chicago
Woods, George J., Chicago	Zearing, Louis A., Princeton
Woods, Ira F., Mt. Carmel	Zeiss, Carl H., Chicago
Woodson, William T., Chicago	Zerwekh, Paul W., Alton
Woodward, F. C., Chicago	Zetterholm, M. E., Galesburg
Woolley, William D., Chicago	Zick, Leo A., Polo
Worthington, M., Jacksonville	Ziska, George W., Chicago

The declaration of war by the United States against the German empire was an inevitable event long foreseen by the lawyers, and no class of professional men was more eager to do something to help win the war. Age, ill-health and other insurmountable obstacles prevented many lawyers from actual service in the army and navy, and it was with genuine satisfaction that they learned of the government's call to volunteer their services as members of selective service boards, four-minute men and liberty bond speakers. Publication of the names of the Illinois lawyers who rendered such services would amount, in practical effect, to a directory of the Illinois bar. The satisfaction they derived from doing their bit was ample reward for the small services they were able to render.

The preparation of this roll of honor has been supervised by the chairman of the State Bar Association committee, Major Edgar B. Tolman, who unselfishly gave nearly three years of his time to the service of the United States, acting as military aide to Gov. Lowden, in charge of carrying out the Selective Service law.

With gratitude and pride we accord to those members of the Illinois bar in the actual service of the United States in the army or navy the distinction of here enrolling their names upon the pages of the Illinois Reports as a lasting reminder of their patriotism and honor.—THE REPORTER.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF ILLINOIS.

(No. 14400.—Decree affirmed.)

ANDREW O'DONNELL, Appellee, vs. LILLIAN O'DONNELL,
Appellant.

Opinion filed April 19, 1922.

1. **TRUSTS**—*a resulting trust arises from a presumed intention.* Where one person pays the purchase money for land and the conveyance of the legal title is made to another a resulting trust arises, not from an agreement but because the law presumes that if the deed is made to someone other than a member of the purchaser's family the grantee was intended to hold the title in trust for the benefit of the one who paid the purchase price.

2. **SAME**—*oral declarations at time of conveyance are admissible to prove resulting trust.* Oral declarations made at and just before the execution of the deed are admissible to prove the intention of the purchaser in taking title in the name of another person so as to establish a resulting trust although the statements were made out of the presence of the grantee, who knew nothing about the conveyance at the time it was made, the transaction having taken place without any previous agreement.

3. **SAME**—*when conveyance to daughter of grantor is not presumed to be a gift.* Where a conveyance is made by a grantor

to his wife or child the law will presume it was a gift, but such presumption is rebutted where the proof shows that the beneficial owner of land had the title conveyed to his daughter merely to substitute her for the trustee who formerly held the legal title to the land, which constituted a large part of the father's estate.

4. *SAME*—when resulting trust arises in partition of partnership estate. A resulting trust ordinarily arises at the time the purchase price is paid and the title passes, but where real property owned in common by partners, which has been held in trust for them, is partitioned in accordance with an agreement and the beneficial interests are set off to each of the partners but one of them causes his share to be conveyed to his daughter, intending her to be a trustee, a resulting trust may be established although the property was originally purchased by the partnership.

APPEAL from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding.

MCARDLE & MCARDLE, for appellant.

WILLIAM GARNETT, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

The bill in this case was filed in the superior court of Cook county by Andrew O'Donnell against his daughter, Lillian, praying that a resulting trust be declared in his favor in and to certain Michigan avenue property in the city of Chicago, the record title to which is in the name of Lillian, and that she, as such trustee, be ordered to convey the premises to him. The bill was answered by the daughter, denying that she holds the property as trustee for her father under a resulting trust and claiming the ownership thereof on the ground that the conveyance to her was absolute and conveyed the fee to her under such conditions that a resulting trust did not arise. After final amendments to and completion of the pleadings the cause was referred to a master in chancery to take testimony and report his conclusions of law and fact. The master made his report, finding the daughter holds the legal title to the property in

trust for the use and benefit of her father. After objections were overruled, the report, with the objections, was filed. The court ordered the objections to stand as exceptions, and after sustaining some of the exceptions and overruling the others, entered a decree that Andrew O'Donnell, the father, is the absolute owner of the premises, and that Lillian, the daughter, holds the legal title to the premises for the use and benefit of her father, and it was ordered that she deliver a properly executed deed therefor to him; that he have possession of the property and of the net rents and profits thereof, which were by agreement of the parties accumulating in the hands of one Dean pending this litigation, and that the daughter pay the costs of suit. From that decree an appeal has been prosecuted by the daughter to this court.

The evidence produced naturally is not altogether in harmony, but the material facts developed on the hearing are that appellee is a man past sixty-five years of age. He had a wife and several children, some of whom were minors, and one of whom is the appellant, Lillian, and also two living married daughters by his first marriage. For many years he had been engaged in buying, selling and trading real estate, purchasing vacant property, improving it and erecting buildings thereon for sale, and during that time had gained holdings worth approximately \$225,000. During a part of this time he had a partner in the business, and for business reasons the legal title to most, if not all, of their acquired properties was taken in the name of Edward Waline, son of appellee's partner, who held the legal title as trustee under a resulting trust for the benefit of the partnership, and he transferred title when requested by the partners. Title to properties acquired and owned by appellee, for about fifteen years prior to 1920, had been taken in the name of his wife, who during that time joined him in the transfer and sale thereof and execution of papers from time to time at the request of appellee, who managed

the properties, received the rents, paid the taxes and repair bills and received the consideration or profit in all deals. The premises here involved were purchased by the partnership from Mrs. Rutter in March, 1916, and the title was taken in the name of Edward Waline, in accordance with the usual custom of the partners. In September, 1918, the son and trustee being about to go into the army, the two partners agreed upon a voluntary partition or division of their partnership holdings, and the premises here in question were a part of the partnership property set off as the share of appellee. This property, at 4840-48 Michigan avenue, was originally purchased by the partnership and four six-apartment buildings were erected thereon, the north two of which are here involved. Their value was stated to be \$70,000, having an incumbrance thereon of \$36,000 and a gross rental earning of \$14,100 per year. Accordingly, after several interviews in the matter of the division of the property, and in the presence of his partner, Waline, his son, Edward, and M. O. Benson, appellee had his conveyancer, Benson, draw a quit-claim deed from Edward Waline, trustee, conveying thereby the two Michigan avenue apartment buildings to the appellant, his daughter. At the same time another quit-claim deed was drafted, wherein the names of the grantor and grantee were the same, conveying two flat-buildings on Indiana avenue. These deeds were dated September 25, 1918, executed and acknowledged on the 30th, and recorded by the conveyancer, at appellee's request, on October 4 and then returned to appellee. The consideration in the deed to the premises was stated to be one dollar. The appellant did not know anything about the transfers until about a week or so thereafter, when she was informed by appellee. At the suggestion and request of the appellee, some weeks later appellant executed a deed for the Indiana avenue apartments, title to which was placed in appellant by another deed made at the same time the conveyance for the Michigan avenue property was made.

None of the rents or proceeds from the sale of the Indiana avenue property were ever paid to or demanded by appellant from appellee, who had received the same. Appellee continued to handle the Michigan avenue property as he formerly did his other properties which he had placed in the name of his wife, paying taxes, repair bills, income tax, receiving rents, etc., though the leases of the apartments, for business reasons, were made in the appellant's name, but she neither received nor demanded any rents or income from the property. Family difficulties arose between appellee and his wife during the spring of 1920, and prior to a final property or money settlement made with his wife by appellee appellant for the first time claimed the title to the Michigan avenue property in her own right as a gift from appellee and served notice upon the tenants to pay the rent to her. By agreement of the parties the rents were paid to one Dean pending the final termination of the litigation between appellee and appellant.

Appellee testified, and proved by witnesses present when he caused the deeds to be made to his daughter, one of whom was the scrivener who drew the deeds and took the acknowledgments, oral declarations of appellee that he desired the legal title placed in appellant to hold for him until he sold the property. Appellee said he desired the conveyances made that way for his convenience in trading, and that he had confidence appellant would make a deed when requested by him, to anyone to whom he sold the property.

Many objections to the decree are urged, but the three principal points upon which appellant urges a reversal are, (1) that the oral declarations of appellee, before and at the time the deed was made, to prove his intention, were incompetent; (2) that the proof shows the conveyance was a gift; (3) that there was no purchase and payment of the purchase price by appellee at the time the deed was made to appellant but appellee was then the beneficial owner, and for that reason no resulting trust could arise.

The master to whom the cause was referred to take the testimony and report conclusions, and the chancellor by the decree, held the oral proof to show appellee's intention in causing the deed to be made to appellant was competent, and in this there was no error. The most frequent facts out of which it is held a resulting trust arises are where one person pays the purchase money for land and the conveyance of the legal title is made to another. In such case the law presumes, if the deed was made to someone other than a member of the purchaser's family, that the grantee holds the title in trust for the benefit of the one who paid the purchase price. A resulting trust does not arise out of an agreement but out of a presumed intention. (26 R. C. L. sec. 57, p. 1214.) It is competent to prove by oral declarations of the purchaser, made before or at the time of the transaction, his intention and purpose in taking the title in the name of another person. *Dodge v. Thomas*, 266 Ill. 76; *Hartley v. Hartley*, 279 id. 593; *Dorman v. Dorman*, 187 id. 154; *Bachseits v. Leichtweis*, 256 id. 357; *Smith v. Smith*, 144 id. 299.

The case of *Delfosse v. Delfosse*, 287 Ill. 251, much relied on by appellant, is not in conflict with the foregoing cases and many others to be found in our Reports. In the *Delfosse* case it was alleged a trust arose out of an express agreement and fraud in violating it. What was said in the opinion in that case was with reference to a constructive trust, which the court said only arises out of some fraud or advantage taken in procuring the conveyance. It was sought to prove declarations of the alleged equitable owner, who was dead, made, after the deeds were executed and recorded, out of the presence of the grantee, and that proof was held incompetent, which was clearly correct. The oral declarations of appellee proved in this case were made at and just before executing the deed and were out of the presence of appellant, but all the authorities, so far as we know, hold such declarations competent to show the inten-

tion in having the title conveyed to someone other than the beneficial owner. The deed was not made to appellant pursuant to any agreement, for she knew nothing about it until afterwards informed by her father and told of the purpose of having the deed made to her.

Appellant contends the proof shows the conveyance to her of the property in controversy was an absolute gift; that it was made pursuant to a purpose long in the mind of appellee, and which he expressed to his family, of giving each of his daughters a flat-building when they became of age. Appellee had two daughters by a former marriage. Both were married. When one of them was twenty-four and the other twenty-eight years old he gave each a vacant lot worth about \$3000. He had five children by his second wife,—four daughters and a son,—all unmarried. The property involved in this suit is worth about \$70,000 and is incumbered for \$36,000. It constitutes a large part of appellee's estate. He is sixty-five years old, and in our opinion the proof clearly shows the conveyance was not a gift to appellant. She made no such claim to the Indiana avenue property, the legal title to which was conveyed to her at the same time the deed to the Michigan avenue property was made. She conveyed the Indiana avenue property to the purchaser from her father at his request and received no part of the consideration paid for it. Where a conveyance is made by the grantor to his wife or child the law will presume it was a gift. Such presumption is not conclusive but may be rebutted by proof. (*Dodge v. Thomas, supra; Hartley v. Hartley, supra; Dorman v. Dorman, supra; 1 Perry on Trusts*,—5th ed.—secs. 146, 147.) We think the evidence clearly shows the conveyance was not intended as a gift.

It is also contended by appellant that a resulting trust can only arise out of the actual purchase and payment of the purchase price at the time the title passes; that at the time the deed was made to appellant appellee owned the

beneficial interest and no resulting trust could arise out of the transaction. The property in controversy, together with other premises, had been previously purchased and paid for by appellee and John Waline, as partners engaged in buying, improving and selling real estate, and for convenience the title to all the property purchased by the partners was taken in Edward Waline. They made a voluntary partition of their real estate, and that, together with the fact that Edward Waline was about to enter the army, made it necessary that another trustee be selected. Conveyances to the holder of the legal title were caused to be made by appellee and Waline of their respective undivided one-half interest in the property set off to the other, and appellee became the sole beneficial owner of the property allotted to him by the partition. It is true, the purchase price of the property in controversy had been previously paid, but it was not the sole property of appellee until the partition. We agree with the master and the chancellor that these conditions supplied the necessary elements for a resulting trust.

The decree of the superior court is affirmed.

Decree affirmed.

(No. 14330.—Reversed and remanded.)

THE PARADISE COAL COMPANY, Plaintiff in Error, *vs.*
THE INDUSTRIAL COMMISSION *et al.*—(MARSHAL L.
BOOKER, Defendant in Error.)

Opinion filed April 19, 1922.

WORKMEN'S COMPENSATION—*when award for permanent partial loss of use of leg is not authorized.* Where an employee suffers a fracture of his leg and is idle for five months while the fracture is healing, an award entered shortly thereafter for forty per cent permanent loss of use of the leg is not authorized, where the evidence shows that the leg is continually improving with use and there is expert testimony that when the fracture is fully healed the leg will be as strong as before the injury.

WRIT OF ERROR to the Circuit Court of St. Clair county; the Hon. GEORGE A. CROW, Judge, presiding.

R. W. ROPIEQUET, and W. C. ROPIEQUET, for plaintiff in error.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This writ of error is prosecuted by leave of court to review a judgment of the circuit court of St. Clair county, entered June 27, 1921. The award of the Industrial Commission was \$302.12 for twenty-two weeks' temporary total incapacity for work and \$959.70 as compensation for forty per cent permanent loss of the use of the left leg. The only question presented for review is whether there is any evidence in the record justifying the second item of the award. Under the law in force at the time the circuit court entered its judgment it had no right to weigh the evidence, and in reviewing its judgment we are bound by the same statutory limitation.

Defendant in error, Marshal L. Booker, a man fifty-four years of age, was employed as a loader in the mine of plaintiff in error and was injured July 14, 1919. His left leg was broken about four inches above the ankle by a fall of coal. Dr. E. J. Burch testified that the break was a plain fracture; that he put the leg in temporary splints, and that he finally put it in a plaster cast and left it there for about seven weeks. Defendant in error claimed that his knee was injured, but the doctor was unable to find any injury or dislocation and there was no swelling of the knee. Defendant in error returned to work December 16, 1919. His leg was weak and he found that he was not able to do as much work as he had done before he was injured. He testified that his leg was improving slowly, and that he was able to do more work at the time of the hearing before

the arbitrator, in February, 1920, than he was when he returned to work two months before. The arbitrator made a personal examination of the legs of defendant in error, and found that the left leg was slightly swollen at the point of the fracture and that it was about one inch greater in circumference than the right leg. The doctor testified that the soreness in the leg and the knee was due to lack of use, and that, in his opinion, when the fracture was fully healed the left leg of defendant in error would be as strong as the right leg and that there would be no permanent loss of the use of the leg.

Taking into consideration that defendant in error was idle for five months on account of this injury and that he had returned to work but two months before the hearing before the arbitrator, and taking into consideration his testimony to the effect that his leg was continually improving with use, we are unable to see how it can be said that the proof in this record shows that defendant in error has suffered a forty per cent permanent loss of the use of his leg by reason of this industrial accident. We must hold, after a careful view of the evidence, that there is no evidence in the record justifying the second item of the commission's award.

The judgment is reversed and the cause is remanded to the circuit court of St. Clair county, with directions to remand the cause to the Industrial Commission for a further hearing on the question whether defendant in error has suffered a permanent partial loss of the use of his left leg by reason of this industrial accident, and with leave to both parties to introduce further testimony, if so advised.

Reversed and remanded, with directions.

(No. 14493.—Cause transferred.)

HARRY R. CUNNINGHAM, Appellant, *vs.* FRANK H. CUNNINGHAM *et al.* Appellees.

Opinion filed April 19, 1922.

1. **PARTNERSHIPS**—*what constitutes the interest of a partner.* In equity the interest of each partner in the partnership property, including lands, is the balance found due to him after the payment of all partnership debts and the adjustment of the partnership account between himself and the co-partners.

2. **FREEHOLD**—*when a freehold is involved.* A freehold is involved where the necessary result of the judgment or decree is that one party gains and the other loses a freehold estate, and also where the title to a freehold is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue even though the judgment or decree does not result in one party gaining and the other losing the estate, but a freehold is not involved where it is only incidentally or collaterally in question and a decision as to the right to relief or the ground of defense is not based upon it.

3. **SAME**—*when suit by a devisee to compel contribution from other devisees does not involve a freehold.* Where all the interest which a devisee was given in partnership property is sold and applied to the payment of the partnership debts, so that he does not realize anything from his specific devise, a suit by him to compel other devisees to contribute ratably to the payment of the debts of the testator, including his partnership obligations, does not involve a freehold, as the suit is merely to recover the value of the property sold.

APPEAL from the Circuit Court of Vermilion county;
the Hon. WALTER BREWER, Judge, presiding.

GEORGE T. BUCKINGHAM, RALPH B. HOLMES, and
CHARLES TROUP, for appellant.

ROBERT R. RODMAN, for appellee Frank H. Cunningham.

C. E. RUSSELL, for appellee Bert M. Cunningham.

Mr. JUSTICE DUNN delivered the opinion of the court:

A bill was filed in the circuit court of Vermilion county by Harry R. Cunningham, one of the beneficiaries under the will of his father, James A. Cunningham, against his two brothers, Frank H. and Bert M. Cunningham, also beneficiaries under the will, charging that his devise and bequest had been sold and the entire proceeds exhausted in paying the debts of the testator, and that the devisees to the defendants had not borne their proportionate share of the debts of the estate and had not contributed ratably with the property devised to the complainant, and praying that the defendants be compelled to contribute their ratable proportions of the excess above his proportionate share which the complainant had been compelled to bear, and that the lands devised to them be decreed subject to a lien for the amounts so respectively found due from them. A demurrer was sustained to the bill, it was dismissed for want of equity, and the complainant appealed.

The bill set forth the testator's will, by which he made various bequests of personal property and devises of real estate in Illinois and Indiana, among others, 416 acres of farm land in Vermilion county, Illinois, to his son Frank and 386 acres of land in Vermilion county, Illinois, to his son Bert. To the complainant he devised a life estate in 320 acres of land in Pulaski county, Indiana, an undivided one-fourth interest in certain lots in the original town of Leeds, now part of the city of Hoopeston, Illinois, and an undivided one-fourth interest in the personal property used in operating the Illinois Canning Factory, consisting of horses, mules, machinery, etc., not including money in use or canned goods. To Anna S. Brown, his daughter, who afterwards married and was known as Anna S. Brownfield, he devised certain real estate, together with a one-fourth interest in the same Hoopeston lots and in the same personal property used in operating the Illinois Can-

ning Factory, in which one-fourth was also given to the complainant. It was then alleged that the testator had sold and conveyed in his lifetime the 320 acres of land in Pulaski county, Indiana, devised to the complainant for life, and at the time of his death was the owner of an undivided one-half interest in the personal property used by the co-partnership of Moore & Cunningham, operating as the Illinois Canning Factory; that the Hoopeston lots were owned in equal shares by the testator and William Moore as tenants in common, and were used in a co-partnership business then and theretofore operated by Moore & Cunningham under the name of the Illinois Canning Factory, and the co-partnership also owned and used certain personal property in the operation of the Illinois Canning Factory, consisting of horses, mules, machinery, etc., which was the same property one-fourth interest in which was devised to the complainant, and that the real estate, together with all the personal property used in operating the Illinois Canning Factory, was sold by William Moore, the surviving partner, and the entire proceeds used in the payment of debts of the partnership. The bill averred that the testator left surviving him his widow and the complainant and defendants, his sons, and his daughter, Anna S. Brown, who is now Anna S. Brownfield, his heirs; that the will was admitted to probate, and the widow renounced its provisions; that all the estate, both real and personal, which belonged to the testator at the time of his death, except the real estate mentioned as devised to the defendants and a certain lot devised to Anna S. Brownfield, had been sold by the administrator with the will annexed of the estate, and the proceeds thereof, except the value of the widow's dower, which she elected to take in money, had been used in payment of debts of the estate; that the widow had caused her dower to be assigned in the land devised to the defendants, and the fair cash market value of the real estate devised to Frank at the time of the death of the testator, ex-

clusive of the value of the dower assigned to his mother, was \$109,000, and the fair cash market value of the premises devised to Bert at the time of the death of the testator, exclusive of the value of the dower assigned to his mother, was \$102,000, and that their value at the present time is at least as much as at the time of their father's death. It is alleged that one-fourth interest in the lots in Hoopeston, together with one-fourth interest in the personal property of the Illinois Canning Factory, at the time of the death of the testator was of the fair cash market value of \$33,000. It was then averred that in certain proceedings in the circuit court of Vermilion county instituted by the administrator with the will annexed of the estate of James A. Cunningham, a decree was entered finding that all real and personal estate belonging to the estate of the testator, except that devised to the defendants and lot 54 in the city of Hoopeston devised to Anna S. Brown, had been sold and the proceeds used in payment of the debts of the estate, and that debts to the amount of \$120,000 were still owing; that there were no assets of the estate or real or personal property which could be sold to pay the debts except the lands devised to the defendants and such an amount as Anna S. Brown should be required to contribute by reason of having sold lot 54 and having received and retained the proceeds thereof, and the decree so rendered apportioned the deficit of \$120,000 as follows: 13/253ds to Anna S. Brown, 124/253ds to Frank H. Cunningham and 116/253ds to Bert M. Cunningham, and a lien was declared upon the real estate of Frank and Bert for their proportionate shares of the deficit. It was then averred that the entire devise and bequest to the complainant had been sold and the proceeds used in paying the debts of the testator; that the devisees to the defendants had not borne their proportionate share of the debts of the estate and had not contributed ratably with the property devised to the complainant, and by reason thereof the complainant had

a right of contribution against them; that the complainant's *pro rata* share of the money necessary to be raised by abatement of specific devises and bequests for payment of the debts of the estate was \$6000; that he had, in fact, contributed the total amount of the value of his devise and bequest to the payment of debts of the estate, to-wit, \$33,000, and by reason thereof was entitled to contribution from the defendants for their proportion of the excess so borne by the complainant; that Frank's ratable share of such excess was \$13,000 and Bert's ratable share was \$12,000, and that said amounts should be made liens upon their interests in the lands devised to them, subject to the lien of the decree obtained by the administrator, and the bill prayed for a decree for contribution and for such other relief as equity might require.

The only ground upon which it is suggested this court has jurisdiction of the appeal is that a freehold is involved; that by the will of James A. Cunningham he made a specific devise of the interest in the lots in Hoopeston used in the business of the Illinois Canning Factory; that the interest so devised was a freehold, and that this freehold is in issue, so that a decision in regard to it is necessary to the decision of the case. In equity the interest of each partner in the partnership stock, including its lands, is the balance found due to him after the payment of all partnership debts and the adjustment of the partnership account between himself and the co-partners. (*Trowbridge v. Cross*, 117 Ill. 109; *Galbraith v. Tracy*, 153 id. 54; *VanHousen v. Copeland*, 180 id. 74.) A freehold is involved in all cases where the necessary result of the judgment or decree is that one party gains and the other party loses a freehold estate, and also where the title to a freehold is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue, although the judgment or decree does not result in one party gaining and the other losing the estate; (*Sanford v. Kane*, 127 Ill. 591;)

but a freehold is not involved where it is only incidentally or collaterally in question and a decision as to the right to relief or the ground of defense is not based upon it. (*Mayor of Roodhouse v. Briggs*, 194 Ill. 435; *Bartley v. Peoria Park District*, 251 id. 373.) The plaintiff's right to contribution does not depend upon the question whether by the will he was given personal property or a freehold estate in real property. His claim for contribution is based upon the fact that a specific devise or bequest was made to him; that he lost the benefit of it by reason of the fact that the whole of it was taken to pay the debts of the testator, while other devises or bequests of the same character and equally liable for the testator's debts were not taken and did not contribute ratably. The interest of the individual members of the partnership proved to be of no value, because the whole of its property, real and personal, was required to pay the debts. It is not claimed that the property was not rightfully sold and applied on the partnership debts. If the appellant has the right in equity to be reimbursed by the other devisees and legatees ratably for the value of the specific property of the partnership given to him by the will of the individual partner but applied to the payment of the partnership debts, that right is not affected by the character of the specific property as real estate or personal property. The property has been sold and cannot be recovered, and the only question is whether its value can be recovered.

The appeal should have been taken to the Appellate Court, and the cause will be transferred to the Appellate Court for the Third District.

Cause transferred.

(No. 14502.—Reversed and remanded.)

THE PEOPLE *ex rel.* W. J. Ehler *et al.* Appellants, *vs.*
THOMAS J. EXTON *et al.* Appellees.

Opinion filed April 19, 1922.

1. SCHOOLS—*when court should sustain demurrer to plea on remandment of cause—amendment.* Where the Supreme Court holds that a demurrer to a plea to an information in *quo warranto* should be sustained, not because the organization of the school district is invalid but because the plea fails to show that the board of education was properly elected, on general remandment of the cause the lower court must sustain the demurrer, but the parties may, if they desire, amend their pleadings and have a new trial.

2. SAME—*act of May 4, 1921, applies only where the organization of a district is invalid.* The validating act of May 4, 1921, applies only where the organization of a community consolidated school district has not been accomplished because of some irregularity, defect or omission in the proceedings, and it does not affect a district held to have been legally organized although the board of education was not legally elected.

APPEAL from the Circuit Court of Champaign county;
the Hon. FRANKLIN H. BOGGS, Judge, presiding.

DOBBINS & DOBBINS, for appellants.

HERRICK & HERRICK, for appellees.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This cause was before this court at a former term (*People v. Exton*, 298 Ill. 119,) on an appeal from a judgment entered in bar of an information in the nature of *quo warranto*. We reversed the judgment for the reason that the circuit court erred in overruling a demurrer filed by appellants to the plea of appellees. The judgment of this court was entered April 21, 1921. By reference to *People v. Williams*, 298 Ill. 86, we decided that the election of appellees

as president and members of the board of education of Thomasboro Community Consolidated School District was void. The case being re-instated in the circuit court of Champaign county, there was nothing for that court to do but enter an order sustaining the demurrer of appellants to the plea of appellees. (*People v. Clark*, 300 Ill. 583.) The cause was remanded generally, and when the cause was re-docketed the parties were entitled to a new trial and to amend their pleadings as they were advised. (*Wolkau v. Wolkau*, 299 Ill. 176.) When the cause was re-instated in the circuit court of Champaign county appellees did not ask or obtain leave to amend their plea or to file additional pleas. They made a motion for "judgment on the plea," their theory apparently being that the validating act of May 4, 1921, had cured the defect in the election which rendered their election void. This act is entitled "An act to legalize the organization of certain community consolidated school districts," (Laws of 1921, p. 796,) and it is clear that it has no application to the district in question, for the reason that the validity of the organization of said district is no longer in question. In *People v. Exton*, *supra*, all objections urged against the validity of the organization of this district were overruled and we held the district to be legally organized. The purpose of the act of May 4, 1921, was to legalize the organization of certain community consolidated school districts. The only districts brought within its terms were those in which attempts had been made to organize as consolidated districts but where the organization had not been accomplished because of some irregularity, defect or omission in the proceedings. It did not apply to and could not have affected districts already legally organized. (*People v. Rich*, 301 Ill. 80.) When the cause was re-instated appellants requested the circuit court to enter an order sustaining the demurrer to the plea, and this motion was denied. This was error. The plea does not show that appellees were elected at an election

held in accordance with the Australian Ballot law, and for that reason it fails to meet the charge in the information.

The judgment is reversed and the cause is remanded to the circuit court of Champaign county for further proceedings consistent with the views herein expressed.

Reversed and remanded.

(No. 13451.—Reversed and remanded.)

ALFRED STEPHENS *et al.* Defendants in Error, *vs.* THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *et al.* Plaintiffs in Error.

Opinion filed April 19, 1922.

1. JURISDICTION—*legislature cannot deprive the circuit court of equitable jurisdiction.* The constitution confers upon the circuit court jurisdiction of all causes in equity, and the legislature is without power to deprive the court of any part of this jurisdiction.

2. INJUNCTION—*equity has jurisdiction to enjoin the creation or compel abatement of nuisance.* A court of equity has jurisdiction to enjoin the creation or compel the abatement of a public nuisance at the suit of the Attorney General or other authorized public official, or of an individual to whom or to whose property it causes or will cause a special and particular injury, as well as a private nuisance at the suit of the injured person.

3. SAME—*in a proper suit equity may compel removal of obstructions from public highway.* An unauthorized obstruction of a public highway is a public nuisance, and it is within the jurisdiction of a court of equity to grant relief by injunction for the prevention or removal of such obstruction at the suit of the proper officials in behalf of the public or of an individual who is directly and specially injured by the obstruction.

4. HIGHWAYS—*when commissioners cannot maintain a bill to compel railroad company to remove obstructions.* The commissioners of highways are not proper parties complainant in a bill to compel a railroad company to remove, as obstructions to travel, pillars set in the roadway of a State aid road to support a bridge of the railroad company over such State aid road.

THOMPSON, J., STONE, C. J., and FARMER and DUNCAN, JJ., specially concurring.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Williamson county; the Hon. D. T. HARTWELL, Judge, presiding.

J. A. CONNELL, and W. O. POTTER, (R. B. SCOTT, of counsel,) for plaintiffs in error.

H. V. FERRELL, and E. M. SPILLER, for defendants in error.

Mr. JUSTICE DUNN delivered the opinion of the court:

The commissioners of highways of the town of West Marion, in Williamson county, filed their bill in the circuit court of that county on August 17, 1917, against the Chicago, Burlington and Quincy Railroad Company and the Herrin and Southern Railroad Company, for an injunction requiring the defendants to remove certain obstructions which the bill alleged constituted and were a public nuisance, from a highway, to restore the highway to its condition before the obstructions were placed in it, and enjoining the defendants from maintaining such obstructions. Upon the appeal of the defendants the Appellate Court reversed the decree of the circuit court, which granted the relief prayed for, and remanded the cause, with directions to enter a modified decree for a part, only, of the relief asked, and a writ of *certiorari* was allowed on the petition of the railroad companies for the purpose of reviewing the record.

The plaintiffs in error offered no evidence and the cause was submitted on the evidence of the defendants in error, which showed these facts: About January 1, 1913, the Herrin and Southern Railroad Company constructed, and the Chicago, Burlington and Quincy Railroad Company under agreement with the former company has since that time operated, a railroad in the town of West Marion, which

crossed, about two and one-fourth miles west of the city of Marion, the Marion and Carbondale road, which has been a public highway of the width of fifty feet for fifty years. It is an overhead crossing, and the railroad track was supported by three rows of six posts about twelve inches in diameter, the center row being in the center of the highway and of the traveled track and the other rows north and south, respectively, and nineteen feet distant from the center row. After the construction of the railroad a concrete hard road was constructed from the city of Marion west to a point two miles west of the crossing, with the exception that such concrete road was not constructed under the railroad and for a space of about thirty-eight feet on either side of it. The circuit court found that the three rows of posts constituted a material and substantial obstruction to the free passage of persons, in vehicles or otherwise, lawfully having a right to travel over the highway, and decreed that defendants remove them within sixty days and restore the highway at the crossing to as good condition as when the posts were placed in the highway, and that the defendants be perpetually enjoined from maintaining the posts in the highway after sixty days. The Appellate Court reversed the decree and remanded the cause, with directions to enter a decree ordering the plaintiffs in error to remove the center row of posts within six months from the date of the decree and to restore that portion of the highway to as good condition as it was in when the posts were placed there and enjoining the plaintiffs in error from thereafter maintaining said center row of posts.

The jurisdiction of the circuit court of the subject matter of this suit cannot be questioned and is not in controversy. The constitution confers upon the circuit court jurisdiction of all causes in equity, and the legislature is without power to deprive it of any part of this jurisdiction. A court of equity has jurisdiction to enjoin the creation or compel the abatement of a public nuisance at the suit of the

Attorney General or other authorized public official, or of an individual to whom or to whose property it causes or will cause a special and particular injury, as well as a private nuisance at the suit of the injured person. An unauthorized obstruction of a public highway is a public nuisance, and it is within the jurisdiction of a court of equity to grant relief by injunction for the prevention or removal of such obstruction at the suit of the proper officials in behalf of the public or of an individual who is directly and specially injured by the obstruction. *Fors v. Anderson*, 270 Ill. 45; *Green v. Oakes*, 17 id. 249.

The chief question argued is the right of the highway commissioners to maintain the suit, the plaintiffs in error contending that the Public Utilities act in force when the suit was brought, and since, deprived the highway commissioners of any authority to represent or act for the public in respect to highways at railroad crossings and placed the entire subject matter of such crossings in the hands of the Public Utilities Commission. At the time the overhead crossing involved in this case was constructed, and until July 1, 1913, the highway commissioners had charge of the roads and bridges in their respective towns, and by paragraph 5 of section 19 of the Railroad Incorporation act every corporation formed under the act was authorized to construct its railway across any highway which its route intersected, subject to the duty of restoring the highway to its former state or to such state as not unnecessarily to have impaired its usefulness. This was an absolute grant of power by the State to the railroad company to construct its road across any highway and no consent of the highway commissioners was required, such consent being necessary only where the railroad was to be constructed along,—that is, lengthwise,—of the highway. (*County of Cook v. Great Western Railroad Co.* 119 Ill. 218.) The right of crossing the highway was subject to the condition that the company should restore the highway so as not unneces-

sarily to impair its usefulness, and this court suggested in *Chicago General Railway Co. v. Chicago, Burlington and Quincy Railroad Co.* 181 Ill. 605, that an unnecessary obstruction caused by the construction of an overhead crossing could be enjoined in a suit on behalf of the public.

In 1913 the law in relation to roads and bridges was codified, revised and amended. (Laws of 1913, p. 521.) Paragraph 6 of section 50 of the revised act provided that the highway commissioners should have general charge of the roads and bridges of their respective towns or districts and keep them in repair and improve them so far as practicable. This was a re-enactment, with slight change of diction, of the previous law, but article 2 of the act created a State highway department and State Highway Commission, and provided that the State Highway Commission should have general supervision of highways and bridges constructed, improved or maintained, in whole or in part, by the aid of State moneys. This article provided for the method of construction of roads by the aid of State moneys, and required such roads and bridges to be kept in repair by the State Highway Commission at the cost of the State. State aid roads were thus specifically excluded from the general charge of the highway commissioners and transferred to the State Highway Commission. At the same session of the legislature the Public Utilities act was passed, section 58 of which prohibited the construction of new grade crossings of highways by railroads but expressly declared that the section should not apply to the replacing of existing crossings. In 1917 these acts were both amended, the Road and Bridge act to provide for the election of one highway commissioner instead of three, the Public Utilities act to bring under the control of the Public Utilities Commission any railroad highway crossing, whether at grade, overhead or by subway. The amendment in question of the Public Utilities act consisted of the addition to section 58, among other things, of the fol-

lowing: "The commission shall also have power by its order to require the reconstruction, alteration, re-location or improvement of any crossing (including the necessary highway approaches thereto) of any railroad across any highway or public road, whether such crossing be at grade or by overhead structure or by subway, whenever the commission finds after a hearing that such reconstruction, alteration, re-location or improvement is necessary to preserve or promote the safety of the public or of the employees or passengers of such railroad. By its original order or supplemental orders in such case, the commission may direct such reconstruction, alteration, re-location or improvement to be made in such manner and upon such terms and conditions as may be reasonable and necessary, and may apportion the cost of such reconstruction, alteration, re-location or improvement between the railroad company or companies and other public utilities affected, or between such company or companies and other public utilities and the State, county, municipality, or other public authority in interest. The cost to be so apportioned shall include the cost of changes or alterations in the equipment of other public utilities affected as well as the cost of the re-location, diversion or establishment of any public highway, made necessary by such reconstruction, alteration, re-location or improvement of said crossing."

Since both of these acts, originally passed at the same session of the legislature, were amended subsequently at the same session of the legislature, they must be construed together as one act so far as they relate to the same subject and with reference to the rule of law stated in *Endlich on Interpretation of Statutes*, sec. 399: "Where, therefore, there is in the same statute a particular enactment and also a general one, which in its most comprehensive sense would include what is embraced in the former, the particular enactment must be operative and the general enactment must be taken to affect only such cases within

its general language as are not within the provisions of the particular enactment. It follows that where an act in one set of provisions gives specific and precise directions to do a particular thing, and in another set prohibits, in general terms, the doing of that which in the broad sense of the words used in the latter would cover the particular act authorized by the former, the more general provisions can not be deemed to include the matters embraced in the more specific ones."

The general language of the Road and Bridge act in conferring upon the highway commissioners general charge of the roads and bridges of their towns and upon the State Highway Commission general supervision of highways and bridges constructed, improved or maintained, in whole or in part, by the aid of State moneys, is sufficiently comprehensive to include all parts of all roads in the State outside of cities and villages and leaves nothing for the amendment which has been quoted to operate on. If the charge and supervision of roads given to highway commissioners and the State Highway Commission give to these bodies charge and supervision of the crossings of highways by railroads, then the amendment of section 58 of the Public Utilities act is of no effect. In accordance with the rule quoted, therefore, the particular enactment of the provisions giving specific and precise authority in the particular matter of crossings of highways by railroads must be given effect in those particular cases, and the more general provisions of the Road and Bridge law cannot be held to apply. If the commission has authority to order the reconstruction or alteration of the crossing of the railroad over the highway in such manner and upon such terms and conditions as may be reasonable and necessary and apportion the costs among the company, the county, town and other public authority, then for that purpose it must have the sole authority, subject to the judicial review of its decision as provided by the act. The question whether the public safety

requires the reconstruction or alteration of the crossing of a public highway by a railroad is an executive question, the decision of which may be committed to an administrative body such as the Public Utilities Commission, subject to review by a court as to the reasonableness of its conclusion, and such action is not a delegation of legislative authority. (*Chicago, Burlington and Quincy Railroad Co. v. Cavanagh*, 278 Ill. 609; *Chicago, Milwaukee and St. Paul Railway Co. v. Lake County*, 287 id. 337.) The legislature has the power to confer authority over the public highways throughout the State upon such local or State officers as it deems best and may divide the authority in such manner as it chooses. The authority over railroad crossings of highways, the place, manner, terms and conditions of such crossings, their construction, reconstruction, alteration or improvement and the apportionment of their cost, has been conferred upon the Public Utilities Commission. Such authority in its nature must be exclusive. Before 1913 railroad companies had the right to cross any highway, and there was no authority to control the manner of crossing or construction, except that it must not unnecessarily impair the usefulness of the highway. The highway commissioners having charge of the highway were the public officials who had authority to enforce the requirement by bill in chancery or petition for *mandamus* in behalf of the public. Now, however, neither the highway commissioners nor the State Highway Commission can maintain a proceeding for that purpose. They have no duty to perform in regard to railroad crossings. The railroad company is bound to obey the order of the Public Utilities Commission, upon which control in the matter of the crossing has been conferred by law. It is immaterial that no order has been made by the commission. It is the only body authorized to order a reconstruction, alteration or change in the crossing, and the fact that it has made no order for that purpose does not authorize any other indi-

vidual, official or board to assume authority to do so. The court can make no order in this case directing any change in the crossing, not because it is without jurisdiction to do so when application is made for that purpose in a proper case, but because the defendants in error have no right to sue. It is only upon a failure to obey a proper order of the commission that the railroad company becomes a wrongdoer. The Public Utilities Commission, alone, was authorized to represent the public, to order changes in the crossing and to apply to the court for enforcement of its orders. No authority has been conferred upon the defendants in error, the highway commissioners, to appear for and represent the public in regard to this crossing. The bill stated no cause of action which they were entitled to maintain.

The judgment of the Appellate Court and the decree of the circuit court will be reversed and the cause will be remanded to the circuit court, with directions to dismiss the bill.

Reversed and remanded, with directions.

THOMPSON, J., STONE, C. J., and FARMER, J., specially concurring:

We concur in the conclusion reached in the principal opinion that the commissioners of highways, as such, were without authority to institute or maintain this suit and that the suit must for that reason be dismissed. The road in question is a State aid road, and the State highway department has jurisdiction of it to the exclusion of the commissioners of highways. The parties complainant having no right to institute or maintain this suit, the circuit court and the Appellate Court were without authority to enter a valid order affecting the merits of this controversy. Inasmuch as the suit must be dismissed for want of necessary parties complainant, it is neither necessary nor proper to consider or decide other controverted questions. (*McMechan v. Yenter*, 301 Ill. 508; *Abernathie v. Rich*, 229 id. 412.) We do not concur in the statement that the Public Utili-

ties (now Commerce) Commission is the only proper party complainant in an action of this nature.

Mr. JUSTICE DUNCAN, also specially concurring:

I also concur in the conclusion reached in the opinion delivered by Mr. Justice Dunn that the commissioners of highways were without authority to file the bill in this case and that the suit for that reason, only, should be dismissed. As a matter of fact, not, however, appearing of record, the obstructions have been removed many months ago by the railroad companies and while this case was pending for decision in this court, and the overhead structures have been changed and re-built by the railroad companies and without any authority or direction of the Public Utilities Commission. All the questions submitted to this court for decision are moot questions and there is no occasion or necessity for further litigation in this case, and had the decision of the court been placed upon the single ground that the proper parties are not complainants in the bill, in accordance with the usual custom of this court when proper parties complainant are not before the court and have not been heard upon the merits, no discussion of the merits of the case would have been indulged in by us. I cannot consent, however, to be understood, by implication or otherwise, as assenting to the proposition that the circuit court can be ousted of its original jurisdiction of the subject matter of this suit, or that the Public Utilities Commission has any jurisdiction or authority whatever to decide any question arising on this record.

The substance of the charge in this bill is, that the pillars or posts in question obstruct the traffic and travel on the public highway and constitute a public nuisance for that reason, only. There is no suggestion or charge of any kind in the bill that the pillars or overhead structures are unsafe or dangerous to the traveling public or to the employees or passengers of the railroad companies while crossing that

crossing, or that for any reason other than already stated any part of the structures there should be changed or reconstructed. The answer of the railroad companies simply denies that the pillars obstruct the highway; avers that the public in general is using and can use the highway as a public thoroughfare without hindrance by the posts and denies that they constitute a public nuisance; denies the right of defendants in error to maintain the suit; alleges that the commission aforesaid is the proper forum and has the power and authority to order or refuse a change in the construction of said crossing, and argues that the circuit court is without authority or jurisdiction to enter any decree or order in this suit. Those are the exact claims made by the railroad companies, and the opinion holds, in substance, that those contentions are correct in every particular; and the fact that the opinion states that there is no question in the case that the circuit court has jurisdiction of the subject matter of the suit does not change the fact that the decision, in effect, does decide that the commission has the sole jurisdiction to decide the questions at issue and that the circuit court has no original jurisdiction of the subject matter of the suit. No other interpretation can be placed upon this holding unless the opinion is to also be interpreted as holding that the commission is the only proper complainant in the bill of complaint and can maintain this suit in the circuit court to abate the nuisance. There is absolutely no such right conferred on the commission by the statute, and I do not think any such holding is intended by the opinion. The opinion does clearly hold, in substance, that since the amendment of 1913 to the Road and Bridge law and the enacting of the Public Utilities act, neither the highway commissioners nor the State Highway Commission can maintain a bill in equity in the circuit court to abate a public nuisance or remove an obstruction in a public highway at or under an overhead or other railroad crossing. The opinion contains these declarations: "It is only upon

a failure to obey a proper order of the commission that the railroad company becomes a wrongdoer. The Public Utilities Commission, alone, was authorized to represent the public, to order changes in the crossing and to apply to the court for enforcement of its orders." The lawyers of this State in reading said opinion would undoubtedly conclude that the real holding is that the circuit court has not now original jurisdiction to entertain a bill in equity by any person, public or private, to abate a nuisance or remove an obstruction from a public highway at or under an overhead or other railroad crossing. The opinion explains this divesting of the court's jurisdiction conferred by the constitution, with the startling declaration that the new Road and Bridge law and the Public Utilities act have divested all public highway authorities, and every private individual who may be affected by the nuisance, of all right or authority to maintain such a suit in the circuit court, but tells us that the circuit court has jurisdiction of the subject matter of such a suit but is powerless to make any order or decree of any kind in such a case because no one can bring the suit in that court. Then, may I ask, has not the court been most effectively divested of such original jurisdiction, and with which it was invested by our State constitution, if this opinion should be adopted as the law? How can a court have jurisdiction of the subject matter of a suit that no person under any circumstances can bring before it?

We must not be driven away from the real proposition by indirection. Section 12 of article 6 of our constitution provides: "The circuit courts shall have original jurisdiction of all causes in law and equity, and such appellate jurisdiction as is or may be provided by law." Take notice that the constitution provides that said courts shall have *original* jurisdiction of all cases in law and equity, and I lay it down as unassailable doctrine that neither the legislature nor this court, nor any other court, can in any way divest the circuit court of such original jurisdiction or in

any way alter or abridge it. Concurrent jurisdiction of such cases may be conferred by the legislature on county or other courts, but no jurisdiction of the circuit court conferred by the constitution can be taken away by the legislature by any act or series of acts. (*Frackelton v. Masters*, 249 Ill. 30; *Wilson v. People*, 94 id. 426.) How, then, may I ask, can a non-judicial body like said commission be said to have the sole and only original jurisdiction of the subject matter of this suit? The circuit court has jurisdiction in equity to entertain a bill filed by the proper party to remove an obstruction from a public highway that amounts to a public nuisance. This court has repeatedly so decided, and that highway commissioners or persons injuriously affected may maintain such a bill when their right is clear and appertains to the public. (*Fors v. Anderson*, 270 Ill. 45; *Hillmer Co. v. Behr*, 264 id. 568; *Green v. Oakes*, 17 id. 249.) Such jurisdiction is *original* jurisdiction, and the fact that the public nuisance is in the highway under an overhead railroad crossing has nothing to do with the jurisdiction of the court. Reviewing an order of the commission on appeal or granting a writ of *mandamus* to compel obedience of an order of the commission by the circuit court is not exercising the original jurisdiction of the court that I am considering in this case, and the opinion I am answering merely dodges the question in an effort to show that it is not ousting the circuit court's jurisdiction when it holds that the public nuisance must first be considered by that body. The real question is, Can the commission, even to the exclusion of the circuit court, have jurisdiction or authority to settle the questions presented by this bill? The answer must necessarily be, no.

It is undoubtedly a clear proposition that the Public Utilities Commission is absolutely without authority to entertain or decide a single issue in this case, and my best guess would at all times have been that the commission would have answered promptly that it had no such authority or juris-

diction. The issues are plain and simple, and are: (1) Are defendants in error proper parties complainant in the bill? (2) Are the posts obstructions to the highway or a public nuisance that the proper road authorities have a right to have abated? (3) Were plaintiffs in error the guilty parties that placed them in the road? (4) Had the circuit court the authority or jurisdiction to decide the issues and to enter the order that it did enter that plaintiffs in error remove the obstructions and pay the costs of the suit? A moment's reflection upon the proposition seems to me ought to be convincing that the commission has no jurisdiction or authority to decide any of those questions, whether the matter was put up to it by way of a bill in equity or by any form of petition calling on it to act and to decide as to such matters. I submit that the foregoing were the very questions, and the only questions, decided by the circuit court, and these simple truths must not be lost sight of in this case.

As the structures complained of existed when this suit was begun, there was not the least ground for a finding or a contention that the structures were dangerous to either the traveling public or to any railroad employee or passenger on the railroad. These questions were absolutely immaterial to the real issues. No change was contemplated by the railroads at that crossing. The commission had ordered no change of the structures at the crossing. No one had asked for such a change. The court made no order as to how the obstructions should be removed or what changes should be made in the other structures. No question of a change of a grade crossing arose or could arise. The railroad crossed the highway by an overhead crossing more than twenty-two feet above the surface of the highway. There was no determination by anyone that the pillars or obstructions would be removed or the structures changed at that crossing until the court ordered the obstructions removed. No one knew up to that moment that any change was necessary or would be necessary. No one had any

right or authority to make the order made by the circuit court except that court. If the jurisdiction of the commission ever came into being it was after the court entered its final order. Then for the first time the fact became known that a change was a necessity and that a change would be made in the structures. In other words, the best claim the railroads could possibly maintain was that the jurisdiction of the Public Utilities Commission began at the moment the circuit court's jurisdiction ceased, or would begin as soon as a proper petition was filed before the commission for directions as to what changes or structures should replace the old structures to insure the public safety and the safety of the railroad employees and passengers. But the railroad companies displayed their insincerity as to having any interest in the commission's deciding the character of the structures to be built and re-built, by building them of their own motion and without consulting the commission. In other words, they recognized the rights of no one but themselves in obstructing the road or in removing the structures and re-building other structures. Railroad companies are as much entitled to their just and legal rights as the humblest and most helpless citizen of the land, and their duty is as much binding upon them as upon that same humble and helpless citizen. Search every sentence in the opinion or any that may be omitted pertaining to the statutory duty of the commission, and not one phrase or one sentence can be found that authorizes or even suggests any authority for deciding the issues decided by the court or for making the order or decree that the court rendered. The statute provides that the commission shall have power by its order to require the reconstruction or alteration of a crossing whenever it finds, after a hearing, that such reconstruction, alteration, etc., is necessary to promote the safety of the public or of the employees or passengers. It never made such a finding, and could not have made it if it had been asked, as no such unsafe condition existed un-

til it was legally determined that the pillars were a public nuisance and had to be removed for that reason.

I concede that the highway commissioners have no right to maintain this suit as the public highway is a State aid road. They have not, under the statute as amended, authority to order the removal of obstructions that may be placed in any part of this State aid road. That authority is now vested by section 151 of the Road and Bridge act in the State Highway Commission, State highway engineer or county superintendent of highways. (Hurd's Stat. 1921, p. 2801.) I entertain no sort of doubt that the State highway department could have maintained this suit as complainant in the bill, and with it as complainant the decree and order of the circuit court in this case would have to be affirmed if the law applicable to the case should be followed. I feel very sure that the commission has absolutely no right or authority to maintain this suit as complainant or to decide any question presented to the circuit court for decision in any kind of a proceeding before it. Its jurisdiction would properly begin where the jurisdiction of the circuit court ceased and upon proper application to it for orders or directions as to the kind of new structures that would be made necessary by the court's order to remove the pillars that were obstructing traffic and travel on the public highway. When those pillars should be ordered removed by the court as a public nuisance at the suit of the proper party complainant, and not till then, new structures would be required, and what the new structures and changes should be, it would be the province of the commission to decide. By such a course and procedure the circuit court would exercise its proper original jurisdiction to order abated a public nuisance in a public highway, and all duties required by the Public Utilities act to be performed by the commission at that crossing, and necessitated only by the court's order, would be performed by the commission exactly as required and contemplated by section 58 of that

act. It is as clear as the noon-day sun, it seems to me, that if the court should have found that the pillars or posts were not a public nuisance and for that reason could be retained by the railroad companies, the commission would never have had any occasion or authority to act in the case at all, for the plain and simple reason that there would be no basis for any claim that the structures were dangerous to the public or to the employees or passengers of the companies or that they should be removed or changed for any other reason. It was only the court's order to abate the nuisance that could call into action the commission, as the commission had absolutely no authority to determine the question whether or not the pillars were obstructions to travel on the public highway, and for that reason, only, a public nuisance. These propositions seem to me so clear as to demonstrate that there is no basis whatever for the claim in the opinion that the provisions of section 58 of the statute will be in any way abrogated by recognizing the unassailable right of the proper highway officials to invoke the original jurisdiction of the circuit court to first determine that the obstructions were or were not a public nuisance.

I recognize in every way and to the very letter the right and authority of the commission to take jurisdiction and authority when the occasion or the necessity arises for it to exercise such authority, but I vigorously dissent from the contention that it had any authority or excuse to act until the circuit court pronounced its legal conclusion that the obstructions must be removed because a public nuisance, as charged in the bill. The statute absolutely gives it no authority to determine whether or not the posts should be removed because obstructions to travel and for that reason a public nuisance, and certainly not to the exclusion of the circuit court's authority and jurisdiction to settle those questions.

(No. 14394.—Reversed and remanded.)

NELLIE HANCOCK, Defendant in Error, *vs.* THE NATIONAL COUNCIL OF THE KNIGHTS AND LADIES OF SECURITY, Plaintiff in Error.

Opinion filed April 19, 1922.

1. **CONTRACTS**—*construction of written contract is for the court.* Where a contract is in writing and there is no question involving proof as to the construction put upon it by the parties its construction is a matter of law for the court and not a question of fact for the jury, and the court should construe the contract and advise the jury of its meaning.

2. **SAME**—*court cannot construe contract contrary to its terms.* Courts do not make contracts for parties who are fully capable of making their own agreements, and if there is no ambiguity about a contract it cannot be construed contrary to its terms.

3. **BENEFIT SOCIETIES**—*question whether statements in application are warranties or representations is for the court.* The question whether alleged false statements in an application for membership in a benefit society constitute warranties or representations should not be left to the jury where the application is made a part of the contract, but the court should instruct the jury whether the statements constitute warranties or representations.

4. **SAME**—*what determines whether statements in an application are material—questions of fact.* Whether statements of an application made as incidental and inducement to a contract of insurance are material is determined by the question whether reasonably careful and intelligent men would have regarded the fact stated as substantially increasing the chances of the event insured against, and such question may be the subject of evidence and raise issues of fact unless the statements are of such a nature that all persons would agree that they are or are not material.

5. **SAME**—*when statement in application is a warranty.* Any statement made by an applicant for insurance which relates to the risk, and is declared by the policy, or in another instrument incorporated with it, to be a condition of the insurance, is a warranty, as its truth is in the nature of a condition precedent and must be literally true to create any liability, and whether the word "warranty" is used or omitted is not conclusive of the nature of such a statement or its effect on the policy.

6. **SAME**—*what is a misrepresentation in application for insurance.* A misrepresentation in an application for insurance is a

statement of something as a fact which is untrue and material to the risk, and which the insured, knowing it to be untrue, states in an attempt to deceive, or which he states positively is true without knowing it to be true and which has a tendency to mislead.

7. *SAME*—*when statements in application will be deemed material whether they are so or not.* Where an application for life insurance is expressly declared to be a part of the contract and the statements therein contained are warranted to be true, said statements will be deemed material whether they are so or not, and if shown to be false there can be no recovery on the contract, however innocently they were made.

8. *SAME*—*what questions in application need not be answered positively.* An applicant for insurance is not required to answer questions as to family history or any other matter which he can not answer truthfully, but may answer that he does not know or that the fact does or does not exist to his knowledge.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Municipal Court of Chicago; the Hon. EDWARD K. JARECKI, Judge, presiding.

A. W. FULTON, JOHN V. McCORMICK, and S. J. FULTON, for plaintiff in error.

GUSTAV E. BEERLY, and JOHN R. McCABE, (ELLIS S. CHESBROUGH, of counsel,) for defendant in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The defendant in error, Nellie Hancock, sued the plaintiff in error, the National Council of the Knights and Ladies of Security, in the municipal court of Chicago, and in her statement of claim set out the execution of a benefit certificate to Patrick Foley on October 16, 1914, for the sum of \$2000, payable to her, and alleged that Foley died on April 10, 1916, and that notice and proof of death were furnished in compliance with the terms of the contract. An affidavit of defense was filed by the defendant, and upon a trial by jury there was a verdict for the plaintiff for \$1862.

Judgment for that sum and costs was entered, and on appeal to the Appellate Court for the First District the judgment was affirmed. This court granted a writ of *certiorari* to bring the record here for review.

The verified statement of defense alleged that the contract between Patrick Foley and the defendant, a copy of which was attached to the statement of claim, consisted of the beneficiary certificate, the application and the constitution and by-laws of the society; that Foley falsely stated in his application that he was a sewer builder employed by James Gleason, sewer builder; that he stated that neither of his parents had been afflicted with consumption although his mother had been so afflicted; that he falsely stated that he did not have and never had consumption; that he falsely stated that he never had a cough, habitual; that he stated that his mother, Mary Foley, had died at the age of seventy-six years, of senility, sick one year, while in fact his mother died at the age of fifty-seven years from tuberculosis; and that the defendant had tendered to plaintiff the amount of assessments paid by Foley, which, after being retained for a time, had been refused and returned to the defendant. These statements of the plaintiff's claim and of the affidavit of defense constituted the issue submitted to the jury as matters of fact.

The plaintiff, to maintain the issues on her part, offered in evidence the benefit certificate, which stated that it was issued by the National Council and accepted by the member only upon the following express warranties, conditions and agreements: that the application for membership, together with the report of the medical examiner, both of which were made part of the certificate, were true in all respects, and each and every part thereof should be held to be a strict warranty and to form the only basis of the liability of the order the same as if set forth in the certificate, and that the application and medical examination, and the constitution and laws of the society, and the benefit certifi-

cate, should all be construed together as forming parts of the contract. Attached to the certificate was a photographic copy of the application, containing the following questions and answers as to matters of defense set up in the affidavit of defense:

"6. What is your business or occupation?—Sewer builder. Give the name and address of your present employer.—James Gleason. Have you any other business, employment or occupation, either regularly or occasionally?—No.

"8. Family record of applicant: * * * (b) Mother, dead. Age at death, seventy-six. Cause of death, senility. Place of death, Chicago, Illinois. Date, February 11, 1904. How long sick, one year. Name and address of attending physician, Dr. Shaw.

"9. Have * * * either of your parents * * * been afflicted with consumption, scrofula, cancer, insanity, epilepsy or heart disease?—No.

"12. (a) Have you now or have you ever had, or has any physician ever treated you for or informed you that you had, any of the following named diseases or symptoms of any disease of the following named organs: * * * cough, habitual; consumption in any form? * * * No."

The defendant on its part introduced evidence that the records of the sewer department of Chicago did not show anyone named Patrick Foley working for the city in the years 1914 and 1915; that in the summer of 1914 Foley slept on a porch and had a continual cough, which was different from a bad cold and of an habitual nature, and that his mother died of pulmonary tuberculosis at the age of fifty-seven. The plaintiff offered in rebuttal evidence that Foley worked in the sewer department under the name of John Foley, his brother; that in 1914 he appeared to be in good health, and the witnesses testifying never noticed any cough and never knew him to have a cough, and that the mother had been ill in her last illness but a short time,—

about two weeks,—and prior to her last illness the condition of her health appeared to be pretty good.

The court in instructing the jury as to the law told them that the statements made by an applicant in his application for a policy of insurance were either instruments of representation or instruments of warranty; that in this case the policy called for warranties, mentioned them and incorporated them as a part of the policy. This was correct, and was followed by an equally correct statement of the nature of a warranty and a representation, and the effect of each on the contract of insurance if untrue. The defendant asked the court to instruct the jury whether the alleged false statements in the application were, as a matter of law, warranties or representations, but the court refused to so instruct and directed the jury to consider the statements of the applicant as to whether they considered them to be representations or warranties. Upon further discussion the court said that the answers were either warranties or representations in the construction of the contract and left the question to be determined by the jury.

Where a contract is in writing and there is no question involving proof as to the construction put upon it by the parties, its construction is a matter of law for the court and not a question of fact for the jury. It is the duty and function of a court to construe such a contract and advise the jury of its meaning. (*Crosse v. Knights and Ladies of Honor*, 254 Ill. 80.) The court erred in refusing to instruct the jury whether the alleged false statements constituted warranties or representations and in leaving that question to the jury. In reply to this plain statement of the duty of the court, it is said that no complaint can be made, because leaving the question of law to the jury was too favorable to the defendant by leaving it open to the jury to find that the statements were warranties. Evidently the jury determined, as a matter of law, that the

statements were representations, and were either believed to be true by the applicant, or if untrue were not material to the risk. However that may be, the verdict of the jury, resting upon a decision as to the law as well as fact, can not have the force of a decision of controverted questions of fact. Whether statements of an application made as incidental and inducement to a contract are material may be the subject of evidence and raise questions of fact unless they are of such a nature that all persons would agree that they are or are not material. Whether a representation is material is determined by the question whether reasonably careful and intelligent men would have regarded the fact stated as substantially increasing the chances of the event insured against, so as to cause a rejection of the application or different conditions. That the representations in this case as to either of the parents of Patrick Foley having been afflicted with consumption and as to his having an habitual cough met the test and were material would necessarily be agreed to by everybody.

Any statement made by an applicant for insurance which relates to the risk, and is declared by the policy, or in another instrument incorporated with it, to be a condition of the insurance, is a warranty. Its truth is in the nature of a condition precedent and must be literally true to create any liability. A misrepresentation is a statement of something as a fact which is untrue and material to the risk, and which the insured states, knowing it to be untrue, in an attempt to deceive, or which he states positively is true without knowing it to be true and which has a tendency to mislead. Neither the fact that the word "warranty" is used or omitted is conclusive of the nature of a statement or its effect on the policy. In construing an insurance contract, if there is any ambiguity or doubt it is resolved against the insurance company because the language of the contract is chosen by it. Language is to be construed strictly against the insurer and according to its common and literal

meaning in favor of the insured. (*Commercial Ins. Co. v. Robinson*, 64 Ill. 265; *Queen Ins. Co. v. Dearborn Building Ass'n*, 175 id. 115; *Forest City Ins. Co. v. Hardesty*, 182 id. 39.) Under this rule it was held in *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474, that if anything can be found in the contract which is ambiguous it will be construed against the insurance company. In that case it was agreed that the statements and representations were warranted to be true, but the policy contained the additional statement that if it had been obtained by or through any fraud, misrepresentation or concealment the policy should be absolutely null and void. It was held that the fraud, concealment and misrepresentation contemplated could have no application to anything other than the answers to the questions in the application, and on that account it was held that answers not material to the risk, which were honestly made in the belief they were true, would not present any obstacle to recovery. It was considered that to give any effect at all to the provision would be by treating the answers as mere representations and not warranties. In *Minnesota Mutual Life Ins. Co. v. Link*, 230 Ill. 273, it was held that statements of an applicant would be treated as representations, the materiality of which must be proved to avoid the contract, rather than warranties which would avoid the contract regardless of their materiality, if such a construction might be reasonably given to the contract. In that case there were answers to questions, at the end of which there was a statement, "Having carefully read and fully understanding the foregoing questions, I declare that I have never had any of the diseases or other serious ailment except pneumonia when nine years old." It was therefore held that this language gave sufficient reason for holding the statements to be representations and not warranties, and the words "other serious ailment" might be said to modify all the negative answers to the preceding list of questions, because it would thereby appear it was only in

respect to serious ailments that the company sought information. Again, in *Spence v. Central Accident Ins. Co.* 236 Ill. 444, it was held that an application for insurance is not a part of the policy unless made so by the language of the policy. The alleged false answer in that case was that the applicant represented that he was sixty-two years of age when, in fact, he was sixty-four years of age. This was held to be a mere representation, because the policy did not make the application part of the policy, and that is not the case here, where it was expressly made part of the policy. In *Weisguth v. Supreme Tribe of Ben Hur*, 272 Ill. 541, the decision in *Continental Life Ins. Co. v. Rogers*, *supra*, was followed, the provisions being so similar that the court declared them to be, in effect, identical.

Parties competent to contract may enter into such agreements with each other as they see fit, and it is the purpose of the law and function of the court to enforce their contract if not in violation of law or opposed to public policy. Courts do not make contracts for parties who are fully capable of making their own agreements, and if there is no ambiguity about a contract the courts cannot permit a construction contrary to its terms. By the contract in this case the benefit certificate, the application for membership and the constitution and by-laws of the society constituted the contract of insurance, and the settled rule of law is that where an application for life insurance is expressly declared to be a part of the contract and the statements therein contained are warranted to be true, such statements will be deemed material whether they are so or not, and if shown to be false there can be no recovery on the contract however innocently the statements had been made. (*Crosse v. Knights and Ladies of Honor*, *supra*.) An applicant for insurance is not required to answer questions as to family history or any other matter which he cannot answer truthfully, but may answer that he does not know or that the fact does or does not exist to his knowledge. The answers

in this case do not relate to matters of opinion or judgment but to matters of fact, and the statements are declared to be warranties. There is nothing in the abstract of record modifying the agreement as to the nature of the statements in the slightest particular, or the stipulations of the policy as above stated, or which could justify the court in interpreting them otherwise, and the abstract is presumed to be sufficient for all purposes of the decision.

The court erred in refusing to instruct the jury that the statements alleged to be false were warranties and if false avoided the policy, and in leaving that question of law to be determined by the jury.

The judgments of the Appellate Court and municipal court are reversed and the cause is remanded to the municipal court.

Reversed and remanded.

(No. 14253.—Reversed and remanded.)

JOHN W. HONEY *et al.* Appellants, *vs.* DAVID B. GAMBRIEL,
Appellee.

Opinion filed April 19, 1922.

1. INJUNCTION—*when complainants cannot maintain bill to restrain interference with fence.* A bill to restrain a defendant from interfering with or tearing down a fence erected by the complainants cannot be maintained unless the complainants prove their right to have the fence maintained in its particular location.

2. DEEDS—*when deed does not reserve an undivided interest.* A provision in a deed to forty acres of land reserving one-half an acre for cemetery purposes "where the graveyard is now situate" is not a reservation of an undivided interest in the forty-acre tract, even though the graveyard referred to contains only one-thirtieth of an acre, as in such case the graveyard will be taken as the common center in determining the location of the half-acre reserved.

3. SAME—*what does not show that land reserved was dedicated for cemetery purposes.* The fact that a grantor, in making a conveyance of forty acres, reserves one-half an acre "where the graveyard is now situate," which graveyard occupies only one-thirtieth

of an acre, does not show that the half-acre was dedicated to cemetery purposes, even though several persons not members of the grantor's family were buried in the graveyard referred to, and two were buried just outside of the original enclosure with the consent of the grantee after he was in possession of the land.

4. BOUNDARIES—*when court of equity may determine boundary of tract.* Where a deed to forty acres of land reserves one-half an acre "where the graveyard is now situate," and it appears that the graveyard referred to contains less than a half-acre, a court of equity may establish the boundaries of the half-acre by treating the graveyard as the common center, as near as practicable, of such half-acre.

APPEAL from the Circuit Court of Jasper county; the Hon. WILLIAM B. WRIGHT, Judge, presiding.

ALBERT E. ISLEY, for appellants.

DAVIDSON & FITHIAN, for appellee.

Mr. CHIEF JUSTICE STONE delivered the opinion of the court:

Appellants filed a bill in the circuit court of Jasper county seeking to restrain appellee from interfering with the use of a certain lot therein described as a cemetery lot. The bill also prayed that the boundaries of the lot be fixed by decree and that appellee be required to re-build the fence around the lot as described in the bill.

The deed to appellee conveyed the southeast quarter of the southwest quarter of the section, "except one-half acre where the graveyard is now situate and a passway from the road thereto." It also conveyed the west 10 acres of the southwest quarter of the southeast quarter of the section, the entire tract being described as 49½ acres. This deed was made in 1886 and the appellee went into possession immediately. A highway extends north and south along the west side of the 40-acre tract above described. At the time appellee took this property there was a small

cemetery, enclosed by a fence, near the west line of the 40-acre tract, the west line of which lot was about 60 feet east of the road and its north line a little over twenty-one rods from the north end of the 40-acre tract. The original lot as it was fenced is $41\frac{1}{2}$ feet north and south by 35 feet east and west and contains about one-thirtieth of an acre. Appellants, who are descendants of a deceased grantor of the appellee, claiming the right to one-half of an acre, went upon appellee's land and fenced in a tract commencing at a point on the east side of the highway sixteen rods south of the north end of the 40-acre tract, extending east ten rods, south eight rods, west ten rods and north eight rods to the place of beginning. The half-acre as fenced includes the cemetery lot as originally fenced, the south line of the fence built by appellants coinciding with and being an extension of the south line of the original cemetery lot, so that the original cemetery lot is located approximately half way between the termini of the south line of the half-acre tract as fenced by appellants. Appellee, some time after the building of this fence, tore it down, claiming the land outside of the original cemetery lot by adverse possession. The chancellor dismissed the bill of appellants for want of equity, and the question involved in the case is appellants' right to put the fence erected by them on the lines used. If they were within their rights in so doing they are entitled to the relief prayed. The determination of this question depends largely upon the construction of the reservation made in the deed to the appellee.

Appellants claim that they were within their rights in going onto the premises and erecting the fence on the lines established by them. They also contend that a public cemetery was dedicated in the half-acre reserved in the deed to appellee and that the description is sufficiently certain to enable a court of equity to determine the lines of the proposed half-acre to be devoted to cemetery purposes. Appellee contends that the original lot was a private cemetery;

that there never had been a dedication of one-half of an acre, and that it is impossible to determine from the language of the deed where the half-acre referred to is to be taken out of the land conveyed to him.

It is not disputed that for years the family of the grantor and some other people in the neighborhood have buried their dead in the original lot and that the lot was fenced and had been kept up. The evidence shows that two people were buried just outside the fence surrounding the original cemetery lot, on the west side thereof. All other burials were within the original lot. On the hearing it developed that appellants had built the fence to include the particular half-acre included by them because they considered it more suitable for cemetery purposes. It is not even contended that there is anything in the deed designating the particular lines used by them in building the fence. It is an elemental rule of law that before a court may decree relief the bill praying such relief must set out a right in the complainant thereto. In this case appellants' bill, to entitle them to the injunction prayed, must set out the right to build and maintain the fence erected by them on the particular lines used before injunction will lie. That they may have had a right to any other line is not material in this case. They would not be entitled to an injunction restraining appellee from destroying the fence on the lines used by them merely because they may have had a right to have a fence somewhere else. The language of the deed, "except one-half acre where the graveyard is now situate," does not designate or describe a particular half-acre. The lot used for a cemetery is not a half-acre but one-thirtieth of an acre. The exact location of the half-acre reserved is not disclosed by the language of the deed, but it is designated as "where the graveyard is now situate."

Appellants contend that since the deed does not describe the land reserved it may be taken as an undivided interest in the whole tract conveyed, and cite *Gill v. Grand Tower*

Mining Co. 92 Ill. 249. In that case the deed conveyed 20 acres out of a quarter and a fractional quarter of a section. There was nothing in the deed to indicate what part of the land referred to was to be conveyed. It was there held that such was a conveyance of an undivided interest in the entire tract. In *Smith v. Crawford*, 81 Ill. 296, it was held that where by deed a tract of land is conveyed of a number of acres less than the whole, without designating the locality of the land conveyed, the grantee acquires an undivided interest in the whole tract as a tenant in common, in the proportion which the number of acres included in the conveyance bears to the entire tract referred to. These cases are to be distinguished from the instant case. Here the deed designates the locality in which the half-acre is reserved. That locality is "where the graveyard is now situate." It cannot be said, therefore, that by this deed an undivided interest in the whole 40 acres is reserved. A deed from A to B of a 40-acre tract, reserving one-half acre therein, is a reservation of an undivided interest under the rule laid down in the cases cited by appellants, but where, as here, the deed shows the locality of the tract sought to be reserved such rule does not apply.

Appellants also contend that this case comes within that rule of law which says that courts of equity will enjoin the owner of land from defacing or meddling with graves on his land or from in any way interfering with the use of the land as a cemetery where such land has been dedicated for cemetery purposes, and cite in support of that position *Davidson v. Reed*, 111 Ill. 167. This rule is not controverted by appellee but he contends that it is not applicable to the present case, for he asserts (and in this he is borne out by the evidence) that he has done nothing to in any way interfere with or deface the graves or tombstones of those heretofore buried there, but has, on the other hand, taken care of them as he had agreed to do; that he at one time assisted in building a fence around the original ceme-

tery lot and has at all times cared for the graves of those buried in that lot.

Appellee contends that there has been no dedication of the particular half-acre fenced in by the appellants in this case. He admits that he permitted the burial of two persons in a strip ten feet in width along the west side of the original burial lot, and it appears from his testimony that he permitted such strip to become a part of the original cemetery lot. In his examination, when asked whether or not he had added a strip ten feet in width outside the original cemetery lot, he replied: "I didn't add a strip on the outside; I let Adam [Adam Crouse, one of the appellants,] add it; I don't know just how long it was; it ran down pretty near the gate." The strip in which the two burials have taken place on the west side of the west fence of the original lot extends north and south along the original lot. This strip was never fenced in with the rest of the original lot.

The record does not support the contention of appellants that there has been a dedication of this half-acre of ground for cemetery purposes. The deed, in its reservation, does not indicate that such a dedication was intended. The reservation was to the grantor. There is nothing in the deed to indicate that it was for any purpose other than for the benefit of the grantor. While the record shows that others than the Honey family were buried in this lot and that the two buried just outside were not members of that family it does not show that this land has been dedicated for cemetery purposes. There is nothing to show that the particular tract of ground fenced in by appellants was ever dedicated as a cemetery. The case of *Davidson v. Reed*, *supra*, was a bill in equity to enjoin the defacing or meddling with certain graves. While, as held in that case, a cemetery may be dedicated as such by the acts of the owner of land in permitting others to bury their dead on it, it appears in this case that the two burials on the strip outside the original

cemetery lot were after appellee came into possession of the land. He testifies that this was with his consent; others testify that he was notified that such burial would take place but that his consent was not asked. However that may be, such a dedication,—if it were to be so held,—of the strip upon which these two bodies were buried cannot be taken as a dedication of the particular strip of land enclosed within the fence erected by appellants. As we have said, there is no evidence whatever that appellee is interfering with or defacing or in any way desecrating the graves of those buried in this graveyard. There is nothing in the language of the deed, and, so far as is shown in this record, there is nothing in the facts, which gave to appellants the right to go upon appellee's land and lay off this particular half-acre. The reason they gave for running the particular lines and building the fence thereon was that such seemed to be the most suitable tract for a cemetery. The determination of the rights of property cannot be made dependent upon the judgment of individuals as to where it should be or what was best suited for it.

It is urged that the language of the deed, "where the graveyard is now situate," is a sufficient identification of the half-acre reserved to enable a court of equity to determine what half-acre was included in the reservation; that the reference to the graveyard was sufficient to make such graveyard the basis of determining that matter. It has been held that where reference is made in a deed to a certain point, such as certain graves and the like, for the purpose of identifying the location of the land conveyed or reserved, such point is to be taken as the common center of the tract. (*Hodge v. Balanton*, 38 Tenn. 560.) It will be seen from what has been said as to the position which the original cemetery lot in this case occupies in the half-acre fenced off by appellants, that there was no attempt on their part to lay off the same with the original lot as a common center but that the original cemetery lot borders on the south

line of the half-acre. It was evidently the intention of the grantor, however, to include the particular graveyard mentioned in the half-acre reserved to himself and his heirs, together with a passageway from the public road. This sufficiently designates the location of the tract reserved to enable a court of equity, under the rule laid down in *Hodge v. Balanton, supra*, to fix the boundary of the half-acre tract with the old graveyard as the common center of the tract.

As a part of the relief sought the bill prayed that the lines of the tract reserved be determined. The court should have proceeded to determine those lines, with the old graveyard, as nearly as practicable, the common center of the tract included within such lines.

Appellee also defended on the ground of adverse possession, claiming possession of all the land outside of the original graveyard for over thirty-five years under claim of ownership. This contention cannot be sustained. In permitting the use of ground outside of the original graveyard he gave evidence that his possession was not adverse and that he was not claiming ownership of all land outside the original tract. He has no other claim to the balance of the half-acre tract. The grantor intended to reserve a tract amounting to one-half an acre for burial purposes, and a court of equity will determine the boundaries of such tract where that can be done. We are of the opinion that it can and should be done in this case.

The chancellor was right in denying the injunction sought, but it was error to refuse to determine the lines of the half-acre reserved as prayed in the bill.

The decree is reversed and the cause remanded, with directions to proceed in accordance with the views herein expressed.

Reversed and remanded, with directions.

(No. 14407.—Decree affirmed.)

WILLIAM F. BOHN, Appellee, vs. IDA MAY IRVINGTON,
Appellant.

Opinion filed April 19, 1922.

1. **WILLS**—*entire will must be considered to determine intention to devise fee.* A fee may be granted without the use of words of inheritance, and a devisee will take a devise in fee unless a less estate is subsequently limited by express words or by limitation of law, but in such case the instrument is to be so construed as to give effect to the intention of the testator as manifested by the language of the entire will.

2. **SAME**—*when devise with power of disposition does not create a fee.* A devise to his widow of all the testator's real estate remaining after the payment of legacies and debts, with power "to dispose of the same as she may choose, except by will," does not create a fee with an unrestricted power of disposition, and a subsequent clause devising to the testator's blood relatives all property not disposed of by the widow in her lifetime is not void for repugnancy.

3. **SAME**—*fee is not devised where power of disposition is limited—repugnancy.* Where a power of disposition in a devise is qualified or limited there is not necessarily a repugnancy between the clause creating such power and a later clause disposing of the property, as the fee is not devised where the power of disposition in the first taker is qualified or limited. (*Dalrymple v. Leach*, 192 Ill. 51, *Wolfer v. Hemmer*, 144 id. 554, and *Wilson v. Turner*, 164 id. 398, distinguished.)

4. **SAME**—*when creation of trust in executors does not indicate intention to devise fee to widow.* Where a testator has devised all the residue of his property to his wife, with power "to dispose of the same as she may choose, except by will," with a devise over of any property remaining undisposed of at her death, a subsequent clause giving all the property in trust to the executors, with power to sell the same to pay debts and legacies, provided that no real property shall be sold within two years after the testator's death, does not indicate that the widow shall take the real estate in fee, as such clause merely creates a power for the benefit of creditors and legatees.

APPEAL from the Circuit Court of Christian county; the
Hon. WILLIAM B. WRIGHT, Judge, presiding.

HOGAN & REESE, for appellant.

MCBRIDE & VOGELSANG, for appellee.

Mr. CHIEF JUSTICE STONE delivered the opinion of the court:

Appellee, William F. Bohn, filed his bill in the circuit court of Christian county for partition of certain real estate described therein, claiming an interest in the real estate under the will of Henry Clay Bohn, deceased. Appellant was not made a party to the bill but secured leave to interplead, and filed an answer averring that she was the legally adopted daughter of Henry Clay Bohn and Mary Francis Bohn; claiming to own the real estate involved in the bill by descent from Mary Francis Bohn, the widow of the testator, and denying that appellee or any of the blood relatives of the testator have any title or interest in the property, but that by the will of Henry Clay Bohn his widow was given the fee to the real estate in question, and that upon her death without having disposed of the same it descended to appellant as her adopted daughter. Appellant also filed a cross-bill, praying a construction of the will and for a decree holding that the real estate belonged to her. Appellee demurred to the cross-bill. The demurrer was sustained, and appellant having elected to stand by the cross-bill, a decree was entered dismissing the same and granting partition under the original bill. The chancellor held that by the will of Henry Clay Bohn his widow took a life estate, and that on her death the property passed to the blood relatives of the testator and that appellant had no right whatever in the premises. From that decree she has appealed.

The will of Henry Clay Bohn, after providing for the payment of debts and funeral expenses, reads as follows:

"Second—I give and bequeath to my adopted daughter, Ida May Bohn, (formerly Ida May Leadbetter,) the sum

of five (\$5) dollars, which sum I intend to be all the said Ida May Bohn shall have out of my estate in any manner or form.

*"Third—*After the payment of my debts and expenses as aforesaid by my executor, I give and bequeath to my beloved wife, Mary Francis Bohn, all of the remainder of my property, both real and personal, to have and to hold the same for her own use and to dispose of the same as she may choose, except by will.

*"Fourth—*It is my further will that if at the time of the death of my said beloved wife, Mary Francis Bohn, there be left remaining and undisposed of, any of said estate or proceeds thereof, either personal or real, that it go and descend to my blood relations in the manner and proportions provided by law.

*"Fifth—*I give and devise all my real estate and personal property, of what nature or kind soever, to James P. King and Mary Francis Bohn, executors of this my last will and testament hereinafter nominated and appointed, in trust for the payment of my just debts and the legacies above specified, with power to sell and dispose of the same at public or private sale, at such time or times and upon such terms as to them shall seem best, provided, however, that no part of the real estate shall be sold at public auction or otherwise until after the expiration of two years from the time of my decease."

Appellant contends that by the third clause of the will the widow was given the absolute right to dispose of the property in any way in which she chose, and that this gave her the fee to the property, and the fee having been given by the third clause, the fourth clause was void for repugnancy; that the widow having taken the fee and having died without disposition of the real estate, the same descended to appellant as her adopted daughter. It appears that the widow made a will but did not include in it the real estate in question. The entire question in the case is

whether or not, under the third clause of the will, the widow was given the fee to said real estate.

It is the rule that a fee may be granted without the use of words of inheritance, and that the devisee will take a fee simple title where an estate is devised without words of inheritance unless a less estate is subsequently limited by express words or by limitation of law, but with such words the instrument is to be so construed as to give effect to the intention of the testator as manifested by the language of the entire instrument. (*Walker v. Pritchard*, 121 Ill. 221; *Powers v. Wells*, 244 id. 558.) It is contended on the part of appellee that the will in this case did limit a less estate, not only by clause 4 of the will, providing for the disposition of the property, if any, after the death of the widow, but by clause 3 itself. It will be noted that clause 3 gives to the widow both the real and personal property for her own use, with power to dispose of the same in any manner which she may choose, except by will. It cannot be said, therefore, that this was an unrestricted power of disposition. By excepting the right to dispose of the property by will the power of disposition is limited to the lifetime of the widow. This argues strongly that the testator intended that no such estate should be given her as would prevent the disposition of it after her death in the manner in which he, the testator, chose, provided she had not in her lifetime disposed of it.

It is a cardinal rule in the construction of wills that the intention of the testator, where not contrary to the law and where it may be determined from the language of the will, must govern. By the second clause of the will the testator bequeaths to appellant the sum of five dollars, using the language, "which sum I intend to be all the said Ida May Bohn shall have out of my estate in any manner or form." There is thus expressed the intention on the part of the testator that his adopted daughter should receive no part of the estate other than the five dollars men-

tioned. While appellant does not claim to take under the will but by descent from her foster-mother, that clause indicates an intention on the part of the testator that such remainder in his lands as his widow does not in her lifetime dispose of shall go to his blood relatives.

In support of the contention that the widow in this case took the fee, appellant has cited the cases of *Dalrymple v. Leach*, 192 Ill. 51, *Wolfer v. Hemmer*, 144 id. 554, and *Wilson v. Turner*, 164 id. 398. In the *Dalrymple* case the will was: "I give, devise and bequeath to my beloved wife two-thirds of all my property, real and personal." The fourth clause of the will provided that "if at my wife's death there is any property then in her possession or control, I desire one-half the same shall revert to my nephew, Frederick Dalrymple." The widow during her lifetime conveyed the real estate devised to her. The nephew, Frederick Dalrymple, died intestate, leaving a daughter and a widow, who sought to recover his interest in the real estate after the death of the testator's widow. It was there held that by the language of the devise to the widow the two-thirds devised to her passed absolutely, unless there was created by the precatory words of the fourth clause a trust for the benefit of the nephew. The rule cited in that case is, that words of entreaty will create a trust if the words, on the whole, are sufficiently imperative and if the subject matter is sufficiently certain, but that the precatory words there used did not come within the rule for the reason that they were not sufficiently certain as to subject matter. That case is to be distinguished from the case at bar, in that in the instant case the words used in the fourth clause of the will are a direct devise of an imperative character and are not precatory words. Nor is that case to be taken as contrary to the general rule that where the power of disposition in the first taker is a qualified or limited power there is not necessarily a repugnancy between the clause creating such power and a later clause disposing of the property. That

case expressly recognizes the rule that where the power of disposition in the first taker is qualified or limited the fee is not devised. The cases of *Wilson v. Turner* and *Wolfer v. Hemmer* are to be distinguished from the instant case in that the devises there gave an unconditional right of disposition, it there being held that where the first taker has by the terms of the will the absolute power to dispose of the property without restriction he must be considered the absolute owner and any limitation over is void for repugnancy. In the instant case the words "except by will," in the clause granting power of disposition, are inconsistent with a fee, and show an intention on the part of the testator to limit and restrict the disposition by the widow. Had the testator intended that his widow should have the fee no reason appears why he should have referred to the power of disposition, nor would there have been any limitation over, or had he intended that she should have absolute disposition of the property it would not have been limited by him to disposition by her during her lifetime.

In *Bradley v. Jenkins*, 276 Ill. 161, the clause of the will devising property to the wife of the testator used the language, "with full power to convey or dispose of the same in any way she may see fit." The will provided by a subsequent clause that all of the property, if any, remaining after the death of his wife should go to the testator's sisters. It was there held that while the words of devise to the widow were sufficient to convey the fee and that if such words stood alone a fee would have been devised, yet when construed in connection with the other provisions of the will it was clear that the testator only intended his widow to take a life estate. In *Gruenewald v. Neu*, 215 Ill. 132, a will in similar language was so construed.

In *Griffiths v. Griffiths*, 198 Ill. 632, the devise was to the wife by the fifth clause of the will, without any limitation in said clause. The sixth clause provided that after the death of the widow the estate should be divided among

the brothers of the testator, share and share alike, excepting such donations as his widow saw fit to make. In construing this will this court said: "It is a familiar rule that in the construction of wills every part of the instrument must be considered and effect given to the intention of the testator. To say that the intention of the deceased husband was to give his wife the absolute fee simple title to his real estate because he gave her the power to dispose of it by donation is unreasonable. If he intended her to have the property in fee she needed no power from him to dispose of it by donation or otherwise,—and this he must be presumed to have known and understood."

We are of the opinion that in this case the limitation on the power of disposition prevented a devise of the fee to the widow, and that the subsequent clause of the will disposing of the fee is not void for repugnancy.

Appellant also contends that the fifth clause of the will shows an intention to vest the fee in the testator's widow, for the reason, she argues, that the entire property was devised to trustees with direction to sell after two years. This argument is based on a misapprehension of the meaning of the fifth clause. That clause specifically says that the testator's property is to be vested in the executors in trust for the purpose of paying his debts and the legacies created by the will. There is no direction to sell but a power so to do after two years. This was evidently inserted for the benefit of the testator's creditors and legatees under the will. As such power was never exercised it is evident that the debts and legacies were paid without the necessity of resorting to it. The fifth clause does not tend to establish an intention on the part of the testator that his widow should take the fee.

The property in question on the death of the widow passed by the fourth clause of the will and appellant had no interest in it, and the circuit court was right in so decreeing. Its decree is therefore affirmed. *Decree affirmed.*

(No. 14293.—Judgment affirmed.)

MINA McCLURE, Defendant in Error, vs. THE HOOPESTON GAS AND ELECTRIC COMPANY, Plaintiff in Error.

Opinion filed April 19, 1922.

1. **NEGLIGENCE**—*what are the essential elements in action for negligence.* The essential elements of a cause of action for negligence are: (1) The existence of a duty on the part of the person charged to protect the complaining party from the injury received; (2) a failure to perform that duty; and (3) an injury resulting from such failure.

2. **SAME**—*when gas company is liable for injury caused by ignition of escaping gas.* The failure of a gas company to repair a leak in a gas pipe after reasonable notice will render the company liable if an injury occurs because of a fire which is the direct result of the escaping gas, as it is the duty of the company to make repairs immediately if there is likelihood of injury.

3. **SAME**—*direct evidence as to how gas became ignited is not necessary.* Direct evidence as to the cause of the ignition of escaping gas is not essential in order to hold a gas company responsible for an explosion and resulting fire, provided the circumstances proven are sufficient to enable the jury to base their verdict upon legitimate inferences drawn therefrom and not upon speculation.

4. **SAME**—*question whether fire was caused by escaping gas is for the jury—res ipsa loquitur.* In an action against a gas company for damages caused by a fire alleged to be the result of escaping gas, whether a *prima facie* case is made by proof of escaping gas and a failure to repair the leak immediately, and whether the doctrine of *res ipsa loquitur* applies, are questions of fact for the jury.

5. **SAME**—*when negligence is the proximate cause of injury.* The negligence of the defendant is the proximate cause of an injury if it can be properly said to have produced the result complained of in natural and continuous sequence, unbroken by any efficient intervening cause.

6. **SAME**—*whether negligence is the proximate cause is for the jury.* Whether there is any evidence that the negligence charged was the proximate cause of the injury is a question of law, but if there is any such evidence it is a question for the jury whether the negligence charged was, in fact, the proximate cause.

7. **SAME**—*when question as to origin of fire is properly submitted to jury.* In an action against a gas company to recover dam-

ages caused by a fire alleged to be the result of the igniting of escaping gas the burden is on the plaintiff to establish the negligence of the defendant, but if there is either direct or circumstantial evidence of negligence by proof of escaping gas and failure to repair the leak after notice, the question as to the origin of the fire is properly submitted to the jury.

8. SAME—*when Supreme Court cannot consider weight of the evidence.* In an action for negligence, where the finding of the jury has been approved by the trial and Appellate Courts, the question whether the weight or preponderance of the evidence is against the verdict cannot be considered by the Supreme Court.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Vermilion county; the Hon. WALTER BREWER, Judge, presiding.

VAUSE & KIGER, (LINDLEY, PENWELL & LINDLEY, of counsel,) for plaintiff in error.

GUNN & PLATT, (WALTER T. GUNN, of counsel,) for defendant in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

Defendant in error recovered a judgment in the circuit court of Vermilion county against plaintiff in error for \$3200 in an action on the case for damages from a fire alleged to have been caused by the ignition of gas escaping from a defective pipe carrying illuminating gas furnished by plaintiff in error to the apartment building owned by defendant in error. After a trial by the court and jury a judgment was entered on the verdict for \$3200, and the case was taken by plaintiff in error to the Appellate Court, where the judgment was affirmed. It has been brought here by petition for *certiorari*.

The plaintiff in error is a corporation engaged in the business of furnishing gas and electricity for commercial purposes to the residents of the city of Hoopeston. Gas is

conducted through pipes to the various residences, including the apartment building of defendant in error. The testimony shows that the apartment building in question was three stories high and that there were four four-room apartments or flats on each floor; that defendant in error, her husband and daughter occupied the south apartment on the first floor; that a small air-shaft about fourteen inches square ran up through the center of the building and connected with various apartments; that the air-shaft in the apartment occupied by defendant in error ran through a closet opening into the kitchen; that in this closet was located a gas meter connected with a gas stove; that pipes connecting with the gas main in the street ran into each apartment, being connected with the gas meter therein, which was in turn connected with what is called a hot-plate, or a gas stove. Each apartment in the building thus had its own meter and the tenant paid for the gas he consumed on the slot principle,—that is, each meter was provided with a slot wherein a twenty-five cent piece could be dropped, and when twenty-five cents' worth of gas had been consumed the meter automatically shut off further gas until another twenty-five cent piece was dropped in the slot. Once a month an inspector for the gas company collected the money out of each meter. The evidence for plaintiff in error tends to show that when this gas equipment was installed in the building it was made with the agreement that if defendant in error would place a gas-plate or stove in each apartment plaintiff in error would install the necessary pipes, meters and connections without charge, and that no charge was ever made by plaintiff in error for any part of the gas equipment in the building except for the hot-plates and the stoves. The apartment occupied by defendant in error and her family originally had a hot-plate therein, but about a year before the fire a gas stove was substituted. James C. McClure, the husband of defendant in error, testified that after the change was made from the

hot-plates to ranges he noticed at different times a strong odor of gas in his own and other flats in the building; that he had observed leaking gas in the building several times during the year preceding the fire, particularly in April or May; that he had noticed leaking gas in the northeast corner of a flat on the third floor, and there had been intervals that gas had leaked in the building from August, 1918, to the time of the fire, in August, 1919; that often when employees of plaintiff in error came to read the meter he called their attention to escaping gas and asked them to correct it, but they always reported, after searching, that they could not find any leak; that he telephoned the office of plaintiff in error three or four months before the fire and complained of a strong odor of gas and asked to have it repaired; that on the morning of the fire he got up about 5:30 and both he and his wife noticed a strong odor of gas but breakfast was prepared on the gas range, and about six o'clock he discovered that the leak was at a gasket or knuckle that joined the meter on the pipe connecting with the gas range; that he touched a match to the leak and a flame shot out about an inch wide and about five inches long. His wife testified that she also examined the gas pipe and lit the gas escaping therefrom with a match and then blew it out. The husband testified that after he had blown out the flame he began trying to reach the plaintiff in error's office by telephone, which he finally succeeded in doing shortly after seven o'clock, and asked for the manager, Austin, and on being told that Austin was out of the city he talked with Austin's son, who was an employee of plaintiff in error, and explained to him about the leak and asked him to send someone out to fix it right away, and advised him of the extent of the leak by telling him of the flame that was caused when he lighted the escaping gas; that Austin said they could not fix the leak that day as they had started a job in another part of the city which they had to finish but would get to his place the next day.

Defendant in error left the building with her daughter to go to a train about 6:30 in the morning, and it was after she left that her husband succeeded in reaching plaintiff in error over the 'phone. The husband further testified that about eight o'clock, leaving no fire or light in the flat and leaving the windows open but locking the doors, he personally went to plaintiff in error's office to tell again about the leak and ask to have it fixed as soon as possible. He also said that he would like to have a change made in the pipes in the basement. The testimony on the part of the plaintiff in error tended to show that he seemed more anxious to have the pipes changed in the basement than to have the gas leak fixed in his apartment; that he told them that if he had a wrench he could fix the leak himself. The evidence on the part of some of plaintiff in error's employees, as well as one of the tenants in the flat above that of defendant in error, was to the effect that McClure talked over the 'phone with an employee of plaintiff in error about fixing the leak and also about changing the pipes in the basement. McClure testified that one of the employees in the office of plaintiff in error stated that they would send out men at once to fix the leak, and three employees made preparations to go to the apartment building to make the repairs; that after he had been so informed he started back to the building and had proceeded about half the distance when he heard the alarm of fire, and on reaching the building found that the fire was in his own flat. The testimony of the witnesses on behalf of plaintiff in error tends to show that the alarm for the fire was shortly after eight o'clock in the morning. The weight of the evidence found in the record would tend to show that the fire occurred before nine o'clock,—probably between 8:30 and 8:45 in the forenoon. The fire burned up through the air shaft from defendant in error's flat to the third floor, destroying much of the roof and doing considerable damage to the west half of the third floor and the south side of

the first floor, burning most of the personal effects in defendant in error's flat. The gas meter for her flat was on the south side of the partition, towards the side where the fire was. McClure testified that he had been told by plaintiff in error's employees never to move the gas meter nor to do anything with the pipes himself.

The fire department of the city of Hoopeston responded to a call to the fire and put it out. The chief of the department testified that judging by where the fire was the greatest, it started in a lower room close to the air-shaft; that there was a gas stove in the apartment which he was told was occupied by defendant in error; that there was a smell very much like gas around there, but there was too much fire to distinguish any flames that indicated the burning of gas. Mrs. Sherfield, who lived on the second floor just above defendant in error's flat, was attracted on the morning of the fire by a smell of burning wood and saw a light blaze through defendant in error's kitchen. Another tenant, Clarence Matthews, noticed the smell of escaping gas at different times before the fire, and testified he had notified the company when a representative came to collect for the meter but was told they could not locate it; that the escaping gas was worse in the kitchen close to the gas stove. His wife, Lillie Matthews, testified to the same effect. C. E. Wyatt, another tenant in one of the flats in the building, testified that he was in his garden when a lady called his attention to the fire, and he attempted to gain entrance to the McClure flat to turn in an alarm by telephone but found the door locked; that he could see the fire inside and saw that the linoleum was burning; that he heard the fire whistle, and knowing the alarm had been given went to his own apartment to rescue some of his personal property; that he noticed the flames were coming from the center of the building. Othie Bruton, who was standing near the defendant in error's flat shortly after the fire broke out, helped move a cook stove out of the

building, and it appeared from the testimony that this stove, having a fire in it, was in an apartment occupied by the O'Neals. The O'Neals lived on the first floor, and the O'Neal kitchen adjoined the closet in which the gas range of defendant in error's apartment was located and where the gas was found escaping by defendant in error and her husband. The testimony also shows that there was an opening about a foot and a half long and about five inches wide from the O'Neal flat into the air-shaft. The evidence also shows that there was a cook stove in an apartment occupied by another tenant, having a fire in it on the morning of the fire; that the south side of this stove was next to a closet, with an opening into the air-shaft similar to the one in the O'Neal apartment, and that opening was right above the one where the meter in the McClure flat was placed.

There is considerable testimony in the record offered on behalf of plaintiff in error as to the leak in defendant in error's flat being one of minor importance as its employees understood from what had been told them by McClure. The testimony of one of the employees of plaintiff in error who had stated to McClure that he would go to the apartment at once and fix the leak was, that when he got to the apartment and found the fire in progress he went immediately to the closet where the McClure meter was located and shut off the gas in the air-shaft where it came into the building. He also testified that he noticed an odor of either sewer gas or waste water at that time and that the waste water-pipe leaked where the gas pipe was; that he found the cooking utensils in the way near the gas meter and had to kick them aside, and that the fire was not out when he shut off the gas. Another employee of plaintiff in error, Orla Krager, testified that he was in the office when McClure came in to complain about the leak, and he agreed with the other employee that McClure seemed to be more anxious to have the pipes changed in the basement than to

fix the gas leak in the closet. One of the witnesses testified that the main gas pipe came up on the north wall of the closet and that the gas stove of defendant in error was against the south wall; that a space of two and a half feet was between the meter and the stove, the meter being about six inches from the main pipe leading into the building; that when they went in to cut off the gas the lead pipe had melted off during the fire and gas was escaping from that.

A motion was made by counsel for plaintiff in error at the close of defendant in error's testimony, and again at the close of all the evidence, to instruct the jury to find plaintiff in error not guilty, which the court denied.

Counsel for plaintiff in error contend that the essential elements of a cause of action for negligence were not proven; that the doctrine of *res ipsa loquitur* does not apply to the facts in this case, and that there is no evidence in the record tending to show the manner in which the escaping gas became ignited, and that the declaration is defective because it does not state the exact manner in which the gas was ignited. This court has stated, in harmony with the authorities on the question, that "the essential elements of a cause of action for negligence are: (1) The existence of a duty on the part of the person charged to protect the complaining party from the injury received; (2) a failure to perform that duty; and (3) an injury resulting from such failure." (*Devaney v. Otis Elevator Co.* 251 Ill. 28.) There is no doubt whatever that the failure of a company to repair a gas leak after reasonable notice will render the company liable if an injury occurs because of a fire which is the direct result of the escaping gas. There is no question, under the evidence here, that there was a gas leak, that it had been reported on the morning of the fire, and that plaintiff in error had a reasonable time, if the notice had been promptly acted on, to repair the leak before the fire. The duty to repair a leak of es-

caping gas is measured by the likelihood of injury, and it was the duty of the gas company in this case to make repairs immediately. (2 Thornton on Law of Oil and Gas,—3d ed.—sec. 693; *Manning v. St. Paul Gas Light Co.* Ann. Cas. 1916E (129 Minn.) 276; *McWilliams v. Kentucky Heating Co.* L. R. A. 1916A, 1224.) The authorities have more than once said that “a company dealing with a substance so dangerous as gas must be held to a high degree of care and the exercise of every reasonable precaution in guarding against accidental injury.” (*Shirey v. Consumers’ Gas Co.* 215 Pa. St. 399.) It would seem from these authorities that the gas company and those employees charged with repairing leaks would necessarily be held to know that at the hour in the morning when this leak was reported fires in other stoves were liable to be burning, and that in view of the character of the leak it would be dangerous to allow the escape of gas to continue. One of the repair men testified for plaintiff in error that if he had known the leak was a dangerous one he could have gotten down to defendant in error’s house in ten minutes. While it was a disputed question in the case whether the leak was so reported by McClure to the gas company over the ’phone as to show its importance, we think the evidence in the record was of such a character that the jury had a right to believe defendant in error’s witnesses and to find that there was not proper care exercised by plaintiff in error to repair the leak.

Counsel for defendant in error concede that there was no positive or direct proof as to how the gas was ignited but that the proof found in the record shows clearly that the gas leak was in the closet; that the closet was near the bottom of an air-shaft about fourteen inches square, which ran up through the building; that this air-shaft connected with three other apartments in which stoves were burning at the time the fire occurred. The proof also shows that the blaze was observed at the top of the roof in the

center of the building where the air-shaft ended, and the evidence tends strongly to show that the fire started in the air-shaft in defendant in error's apartment, and there is evidence that the cooking utensils which were located near the McClure gas meter were scattered about as though there might have been an explosion of gas, although there is evidence on the part of an employee of plaintiff in error that he scattered these utensils with his feet when he went into the closet to turn off the gas. It would seem from the record that the jury were justified in finding that the gas was ignited by coming in contact with fires in adjoining apartments, by means of the air-shaft.

It is urged by counsel for plaintiff in error that the counts of the declaration do not in any way set out how the gas became ignited. The first additional count of the declaration contains the averment that "while the plaintiff was using her said premises with due care and caution for its safety and preservation, said gas from said pipe escaped into a certain other room in said building of the plaintiff and not occupied by the plaintiff and became ignited." The proof shows that there was no fire in defendant in error's apartment at the time the gas became ignited, and that neither defendant in error nor her husband was guilty of any negligence in causing the fire. Furthermore, it has been held by the authorities that there need not be any direct evidence as to the cause of the ignition of gas in order to hold a gas company responsible for an explosion. In *Luengene v. Power Co.* 86 Kan. 866, the court said (p. 870): "There was no evidence of the cause of the ignition of gas in the basement where the explosion occurred by which appellant was injured, and the jury so found. An instruction was asked to the effect that in the absence of such evidence the action must fail. This was refused, and an instruction was given to the effect that such evidence was not essential to a recovery if the proof was otherwise sufficient and the plaintiff in error was not

negligent. * * * The argument is that there was an efficient and direct cause intervening between the negligence of the company and the injury to the appellant; that the ignition was this proximate cause, and that the alleged negligence of the company only furnished the condition or gave rise to the occasion by which the injury was made possible. [Citing authorities.] The principle enunciated in the cases cited is not applicable to relieve a party from such results of his negligence as ought reasonably to have been foreseen. A multitude of definitions has not made the meaning of the term 'proximate cause' entirely clear in every possible situation, and it is affirmed by a distinguished author that no fixed and immediate rule can be applied to all cases. * * * To hold that a man engaged in his usual work, exercising ordinary care and unwarned of any danger, must, when injured by such an explosion, prove what intervening hand or agency caused the spark is unreasonable and in many cases would be impossible. A cause of injury is not too remote if, according to the usual experience of mankind, the result ought to have been apprehended." In a somewhat similar case, *Moore v. Lanier*, 52 Fla. 353, the court said (p. 360): "In an action brought to recover damages for property destroyed through the negligence of another the declaration should allege facts showing the negligence complained of to be a proximate cause of the injury sustained. Proximate cause is that which naturally leads to or produces, or contributes directly to producing, a result such as might be expected by any reasonable and prudent man as likely to directly and naturally follow and flow out of the performance or non-performance of any act. [Citing authorities.] If the injury complained of is traceable directly to the negligence and careless escape of gas into the storeroom, although the immediate cause of the explosion was ignition, the defendant is liable, under the allegations of the declaration, if the injury was one that could reasonably have been expected un-

der the attending circumstances. * * * Whether the defendant was responsible for the ignition or not is immaterial in this case, since the ignition was not an intervening independent cause but both it and the gas were present and directly contributing causes of the explosion. If the gas was present because of the negligence of the defendant, as alleged in the declaration, he is responsible for all the direct consequences of its presence that could reasonably have been anticipated. It cannot be said, as a matter of law, that ignition and explosion from some condition or cause would not naturally, probably and directly follow the escape of gas into a storeroom. * * * If the gas was present because the defendant did negligently and carelessly fit, install and equip the service pipe in the storeroom and it became ignited without the plaintiff's negligence contributing thereto and an explosion occurred, the defendant is liable for the damages resulting from the explosion even though he was not responsible for the ignition."

The Latin maxim *res ipsa loquitur* has frequently been discussed by this and other courts. In *Chicago Union Traction Co. v. Giese*, 229 Ill. 260, this court said among other things (p. 263): "Many cases are to be found illustrating the application of this rule. In some of them it is said that the rule is an exception to the general rule that negligence will never be inferred, while in others it is not treated as an exception but is treated as an evidentiary rule, under which the charge of negligence is regarded as proven, *prima facie*, by proof of facts showing that the thing which caused the injury was under the management and control of the defendant or his servants, and that the accident is such as in the ordinary course of things does not happen if those who have the management use proper care. (Webb's Pollock on Torts, p. 550.) The more accurate statement of the law is, that negligence is never presumed, but that the circumstances surrounding a case where the maxim *res ipsa loquitur* applies amount to evi-

dence from which the fact of negligence may be found. In the case before us all of the elements of the accident were within the complete control of appellant, and the result is so far out of the usual course of things that there is no fair inference that it could have been produced by any other cause than negligence."

In *Illinois Central Railroad Co. v. Siler*, 229 Ill. 390, this court, after stating that what is the proximate cause of an injury is usually a question of fact, and citing authorities in support of that conclusion, said (p. 393): "It can only arise as a question of law or pleading when the facts are not only undisputed, but are also such that there can be no difference, in the judgment of reasonable men, as to the inferences to be drawn from them." The court then continued, on page 394: "Everyone is bound to anticipate the results naturally following from his acts. The appellant was therefore bound to anticipate, when the fire started, that the decedent would try to put it out. This she was doing, and the allegation is that she was using all due care and caution for her own personal safety. If in so doing the fire which appellant had negligently set out spread to and ignited her clothing without any want on her part of the care which an ordinarily prudent person would exercise under the circumstances, the appellant should be held to have anticipated such result as probable and to be liable therefor. * * * If the consequences follow in unbroken sequence from the wrong to the injury without an intervening efficient cause, it is sufficient if at the time of the negligence the wrongdoer might by the exercise of ordinary care have foreseen that some injury might result from his negligence. [Citing authorities.] The rule as to what constitutes proximate cause was considered in the case of *Atchison, Topeka and Santa Fe Railroad Co. v. Stanford*, 12 Kan. 354, and it was said: 'Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence, and if they are such as

might with reasonable diligence have been foreseen, the last result, as well as the first and every intermediate result, is to be considered, in law, as the proximate result of the first wrong cause. But whenever a new cause intervenes which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer and except for which the final injurious consequence could not have happened, then such injurious consequences must be deemed too remote to constitute the basis of the cause of action.' In *Milwaukee and St. Paul Railway Co. v. Kellogg*, 94 U. S. 469, it is said: "The question always is, Was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? * * * The inquiry must, therefore, always be whether there was any intermediate cause, disconnected from the primary fault and self-operating, which produced the injury.'"

In discussing the maxim *res ipsa loquitur* and its application to the case under consideration in *Gould v. Winona Gas Co.* 10 L. R. A. (N. S.) 889, the court said (p. 895): "One of the essentials to the application of the maxim is clearly present. The agency was admittedly in the exclusive management of the defendant. Its condition was peculiarly within its knowledge, and within the possibility of its knowledge only. The other essential is also here. The result was such as in the ordinary course of things does not happen if those who have the management used proper care."

In *Sipple v. Laclede Gaslight Co.* 125 Mo. App. 81, the court said: "Upon the application of the sound and just principle stated, the courts have universally adjudged, in

the absence of an intervening agency appearing which negatives the idea of negligence on the part of the gas company, that *prima facie* proof is made on the question of negligence by showing the break or leak in the main, and consequent escape of gas, which operated proximately to cause the loss. Such proof is sufficient to sustain the inference of negligence by the jury."

In *Greaney v. Holyoke Water and Power Co.* 174 Mass. 437, it was held that the trial court rightly instructed the jury as to the law on the subject where the instruction stated: "If what happened is of such kind and nature that the power of explanation is in the hands of the party against whom the case is brought, you have a right to say they ought to come forward and explain it, otherwise not,—that is, the burden of proof is upon the plaintiff to show that the fault lies on the part of the defendant; and unless that evidence is brought forward of such a kind and nature that the explanation of how it happened lies wholly within the knowledge of the defendant, then the defendant would not be called upon to explain."

In *Morrison v. Superior Light and Power Co.* 134 Wis. 167, the court said (p. 171): "Counsel argue at length, citing many authorities, to the effect that the existence of a defect in a gas company's pipe allowing a dangerous escape and accumulation of gas is evidence, unexplained, of negligence. The authorities so hold."

In *Coffeyville Mining and Gas Co. v. Carter*, 65 Kan. 565, the court said: "The rule at common law is, where an agent so introduced is controllable by care, attention or science, he who receives the benefit must assume the responsibility. It is neither pleaded nor was an attempt made to show contributory negligence on the part of deceased. In this condition of the record it was wholly immaterial how the gas became ignited."

"The general rule is, that whoever does a wrongful act is answerable for all consequences that may ensue in the

ordinary course of events, though such consequences are immediately and directly brought about by an intervening cause, if such intervening cause was set in motion by the original wrongdoer or was in reality only a condition on or through which the negligent act operated to produce the injurious result. Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence, and if they are such as might with reasonable diligence have been foreseen, the last result as well as the first, and every intermediate result, is to be considered in law as the proximate result of the first wrongful cause. The question always is, Was there any unbroken connection between the wrongful act and the injury?—a continuous operation? Did the facts constitute a succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? The test is to be found in the probable injurious consequences which were to be anticipated,—not in the number of subsequent events and agencies which might arise.” (22 R. C. L. 134, 135.)

It cannot be said that the result of escaping gas must necessarily be an explosion or a fire. That may be the result under certain circumstances and it may not be under other circumstances, and it depends upon what is shown to exist whether a *prima facie* case of negligence is made and the doctrine of *res ipsa loquitur* may be properly applied. A jury may find negligence from the breaking of a gas pipe and the consequent escape of gas, but it is for them to decide whether they will so find or not, and if there are other circumstances in the case they must weigh them all. (*Carmody v. Boston Gas Light Co.* 162 Mass. 539.) The negligence of the defendant must be the proximate cause of the injury, and it is the proximate cause thereof if it can be properly said to have produced the result complained of, in natural and continuous sequence, unbroken by any efficient intervening cause. (2 Thornton on Law of Oil and

Gas,—3d ed.—sec. 691.) Where there is evidence that the negligence charged was the proximate cause of the injury the question is one for the jury, but whether there is any such evidence is a question of law. (*Seymour v. Union Stock Yards Co.* 224 Ill. 579.) The evidence should be sufficiently definite, in an action to recover damages for injuries alleged to be caused by negligence in permitting gas to escape, as not to leave the jury to speculate as to the cause of the injury. There are many decisions, however, to the effect that a gas company is not relieved from liability for an injury caused by gas escaping from its pipes although the injury is due to the concurrent negligence of the company and a third person not in privity with the plaintiff. (12 R. C. L. 912, 913.)

While there have apparently been conflicting decisions as to the presumption of outside agencies, and some courts have stated that they will take judicial notice that gas will not explode unless caused by some outside agency, as the introduction of fire or an electric spark, yet it is generally held that the occurrence of injuries which do not ordinarily happen when reasonable and proper care is taken to avoid them, affords a presumption of negligence and places upon the defendant the burden of proof that ordinary and reasonable care was taken to avoid the accident, where the cause of the accident is in fact unexplained. (2 Thornton on Law of Oil and Gas,—3d ed.—secs. 688, 689. See, also, the reasoning in *North Chicago Street Railway Co. v. Cotton*, 140 Ill. 486, and *Chicago City Railway Co. v. Carroll*, 206 id. 318.) Generally the burden of proof is held to be on the plaintiff to establish the negligence of a gas company, but such proof may be either by direct or circumstantial evidence, and generally it is held that this is a question of fact for the jury in a case where the question is, What caused the fire? (11 R. C. L. 995, and cases there cited.) The origin of a fire has generally been held sufficiently established by inferences drawn from slight circum-

stantial evidence. *Pure Oil Co. v. Chicago, Milwaukee and St. Paul Railway Co.* 56 Mont. 266, and authorities there cited.

It is contended that instruction No. 1 for defendant in error omits to incorporate the element of the duty of defendant in error to exercise due care. Other instructions given to the jury state positively that there could be no recovery if defendant in error was guilty of negligence, and it is elementary that instructions should be considered as a series.

The other instructions complained of, to the effect that there was no evidence tending to show how the escaping gas became ignited, do not need specific consideration, as the questions of law involved therein have been sufficiently covered by what has already been said in this opinion.

The allegations of negligence found in the declaration are sufficient where proof is offered of circumstances from which an imputation of negligence necessarily arises. (*Feldman v. Chicago Railways Co.* 289 Ill. 25; *Chicago Union Traction Co. v. Giese, supra.*) In this connection we are not called upon to find whether the declaration here would be held good if tested by demurrer. The case was tried on the general allegations of the declaration, including that of ignition, and followed by proof of circumstances which raised a legitimate inference of ignition by reason of the escaping gas coming in contact with the fire in a lighted stove, and the declaration was sufficient under the reasoning of this court in *Sargent Co. v. Baublis*, 215 Ill. 428, and *Humason v. Michigan Central Railroad Co.* 259 id. 462, and cases cited.

The question whether or not plaintiff in error is liable on this record for the damages largely depends upon the controverted facts presented in the evidence. This court has often said that the weight to be given to the evidence must be submitted to the jury, and when their finding of fact has been approved by the trial and Appellate Courts,

the question whether the evidence is sufficient to support the verdict or whether the weight or preponderance of the evidence is against the verdict of the jury cannot be raised here. *Reiter v. Standard Scale Co.* 237 Ill. 374, and cases cited.

We find no reversible error in the record. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(No. 14533.—Decree affirmed.)

MARY TOMANICKA, Appellee, vs. JACOB GLOS, Appellant.

Opinion filed April 19, 1922.

1. SPECIAL ASSESSMENTS—*judgment holding first installment of assessment void is res judicata of subsequent installments.* A judgment refusing sale for one installment of a special assessment on the ground that the assessment is void is *res judicata* and conclusive as to the collection of further installments of the same assessment.

2. TAX DEEDS—*section 224 of Revenue act does not require reimbursement for payment of void assessment.* Section 224 of the Revenue act does not require, as a condition precedent to setting aside a tax deed, reimbursement for the payment of an unauthorized and illegal tax or of a special assessment which was held void before the sale was made.

APPEAL from the Circuit Court of Cook county; the Hon. GEORGE FRED RUSH, Judge, presiding.

JOHN R. O'CONNOR, and ALBEN F. BATES, for appellant.

NOVAK & NOVAK, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This is a proceeding filed in the circuit court of Cook county in 1916 to register title to a lot in Chicago under the so-called Torrens act, setting forth that the applicant, Mary

Tomanicka, is the owner of the lot and that the only other persons claiming an interest therein are Jacob Glos and Charles W. Novak, trustee in a trust deed given on the land. Thereafter, by an amendment to the application, it was stated that the interest of Glos was based upon a tax deed for the sale of the property for five alleged annual installments of a special assessment on the lot. The pleadings having been settled the matter was referred to an examiner of titles, who heard evidence and found the applicant was the owner of the premises and that Glos was not entitled to any reimbursement for the amounts paid for the tax deed, and recommended that the tax deed be held void and set aside as a cloud upon the applicant's title and that applicant pay the costs of the proceeding, including such costs or charges as might be taxed in favor of Glos under the decree. Objections were filed to the report and overruled and the objections stood as exceptions in the circuit court. Thereafter the exceptions were overruled and a decree entered finding that the applicant is the owner of the premises and entitled to registration of her title, and that the tax deed to Glos be held void, without reimbursement.

On this appeal it is urged that error was committed by the trial court in failing to require reimbursement for the amounts paid out at the several sales of the land for installments of a special assessment, pursuant to which sales the tax deed to Glos was issued. While apparently other questions were raised in support of her objections by appellee in the trial court, the only question urged here is that the special assessments for which the land was sold were illegal and void, and therefore that the sale and the deed based on these assessments are illegal and void, and that under the provisions of section 224 of the Revenue act reimbursement was not required to be made to the purchaser before the tax deed was set aside in this proceeding.

Section 224 of the Revenue act, which provides for reimbursement, contains, among other things, an exception

"that the real estate was not liable to the tax or assessment." (2 Hurd's Stat. 1921, p. 2694.) The proviso of the statute which states that reimbursement shall be made provides for reimbursement for all taxes and legal costs properly paid. In construing section 224 this court has had occasion many times to pass on the question what taxes and costs will be required to be reimbursed before setting aside tax deeds. In *Wilmerton v. Phillips*, 103 Ill. 78, the court, after citing certain cases which hold that reimbursements should be made, said (p. 81): "The cases relied on are not applicable to the facts in this case. Had appellee been under any legal liability or obligation to pay the tax for which the land in this case was sold then the above authorities would be in point, but such is not the case. As we have already seen, neither the firm of Phillips, Carmichael & Co., nor any of its members, were liable to a personal tax assessment in the township, hence the assessment, levy, and all proceedings relating to the matter, were and are absolutely null and void, and appellee having consequently incurred no liability with respect to the same, it would be simply a tax upon justice to deny him relief except upon the condition that he should pay a sum of money that he never owed and which he was therefore under no legal or moral obligation to pay. Purchasers at tax sales, while availing themselves of the opportunity of obtaining highly remunerative profits on small investments, are bound to know at their peril, when purchasing at a tax sale, that the supposed delinquent is in truth and in fact a delinquent,—that he has been lawfully assessed and has failed to make payment, etc."

In *Boals v. Bachmann*, 201 Ill. 340, the court in considering this section of the Revenue law said (p. 343): "It is a maxim in chancery that he who seeks equity must do equity, and we have always held that upon a bill to set aside a tax sale or tax deed relief will be granted the complainant only upon condition that he re-pay the legal taxes and

costs paid out by the purchaser. But that rule can have no application to a case where the tax is illegal and void, for the simple reason that to require the payment of an unauthorized tax as a condition precedent to setting aside the sale would result in compelling by indirection the payment of the unauthorized tax.—*Wilmerton v. Phillips, supra*; *Riverside Co. v. Howell*, 113 Ill. 256; *Miller v. Cook*, 135 id. 190; *Langlois v. Cameron*, 201 id. 301.”

In discussing this section of the Revenue act in *Glos v. Shedd*, 218 Ill. 209, the court said (p. 219): “It was not in contemplation of the statute or the requirements of equity that defendant in error, in order to remove the cloud of such void sale, should reimburse any person for the taxes which had already been paid by the owner and for which the land was illegally sold. The statute is, that the holder of the tax deed should be reimbursed for all taxes, legal costs and penalties as shall have been properly paid. [Citing authorities.] If the taxes were paid by the owner before the sale then there was no delinquency, and the alleged purchaser, *Glos*, did not properly pay any taxes within the contemplation of the statute and was not entitled to be reimbursed for any payment so made.” (Citing authorities).

The reasoning of this court in *Kelle v. Egan*, 256 Ill. 45, as to when the owner should be required to reimburse for the payment of taxes and legal costs and penalties properly paid, is in accord with the cases just cited on this point.

The record shows that the special assessment upon which the sales for the five installments to appellant were based had previous to those sales been declared void by this court, on application for sale for non-payment of the first installment, in *Young v. People*, 196 Ill. 603, in 1902. These sales were all made in November, 1910. There is no merit in the argument of counsel for appellant that the subsequent installments of the assessment after the first

would not necessarily be held void and uncollectible for the same reason that the first installment was held not collectible in the *Young case*, for this court has held that where there has been a judgment refusing sale for one installment of an assessment, that judgment will be held *res judicata* and conclusive as to the collection of further installments. (*Markley v. People*, 171 Ill. 260.) Therefore, there can be no escape from the conclusion that the first installment having been held void by this court the subsequent installments of the same assessment must also be held void, and it necessarily follows that section 224 of the Revenue act, as construed by this court, does not require, as a condition precedent to setting aside the sale and an illegal tax deed, reimbursement for money paid for unauthorized and illegal taxes.

We do not think the authorities cited by appellant from other jurisdictions are in point, as they construe statutes that are different in wording from section 224, under which it is insisted these taxes should be reimbursed to appellant. Neither do we think the authorities cited from this jurisdiction are in point, as the conditions under which such taxes were paid were entirely different from those under which the taxes for these void installments were paid. The question whether a purchaser should be reimbursed for taxes paid at a tax sale under which a tax deed has been granted to him, before the setting aside of such tax deed, depends entirely upon the wording of section 224. As this section has been construed, on the facts in this record appellant was not entitled to have the money paid for these void installments re-paid before the tax deed was set aside.

The decree of the circuit court will therefore be affirmed.

Decree affirmed.

(No. 14459.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. JOSEPH KOZEL *et al.* Plaintiffs in Error.

Opinion filed April 19, 1922.

1. CRIMINAL LAW—*allegation of special property in the person robbed is sufficient.* In an indictment for robbery, an allegation that the money taken was in the care, custody and control of the person robbed and was taken from his person and against his will is sufficient, and when supported by proof will sustain a conviction regardless of a variance between the allegation and proof as to the corporate name of such person's employer. (*People v. Knox*, 302 Ill. 471, followed.)

2. SAME—*briefs should point out wherein refusal to give instructions constituted error.* The mere statement in the briefs that the trial court erred in refusing to give certain instructions amounts to no more than an assignment of error, and, even though the instructions refused are set out in the briefs, the alleged error is waived if no reasons are urged to show why the instructions should have been given, particularly where the matters contained in the refused instructions are covered by the instructions given.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. FRANCIS S. WILSON, Judge, presiding.

O'BRIEN, PRYSTALSKI & OWEN, (THOMAS E. SWANSON, of counsel,) for plaintiffs in error.

EDWARD J. BRUNDAGE, Attorney General, ROBERT E. CROWE, State's Attorney, and EDWARD C. FITCH, (EDWARD E. WILSON, and CLYDE C. FISHER, of counsel,) for the People.

Mr. JUSTICE CARTER delivered the opinion of the court:

Plaintiffs in error were indicted, tried and convicted of the crime of robbery while armed with a revolver and each was sentenced to confinement in the penitentiary. From that judgment this writ of error has been sued out to review the record.

The evidence shows that on April 15, 1921, at about 9:50 in the forenoon, four persons armed with revolvers entered the Cicero State Bank, located at Cicero, in Cook county, and ordered the officers and employees to go into the vault in the rear of the bank, together with three or four customers who were in the bank, which they all did. The men then took several thousand dollars from the vault safe and from the paying teller's cage. The police having been notified that the bank was being robbed immediately started for the scene. Three men were captured as they ran from the building and one was killed in the shooting at the bank. The evidence of the police officers and the officers and employees of the bank showed clearly that these three plaintiffs in error took part in this robbery. No serious question is made in the briefs that the proof as to the identity of each of the three was not sufficiently established.

The principal question urged in the briefs of plaintiffs in error is the alleged lack of legal proof that the bank in which the robbery took place is a corporation. Charles C. Stoffel, vice-president of the bank, testified that there are about thirty-nine stockholders, and that the Cicero State Bank is an Illinois corporation and has been doing business as a corporation since May, 1907. The exercise of corporate powers being thus shown, the accused cannot raise this question on this record. *Waller v. People*, 175 Ill. 221; *Graff v. People*, 208 id. 312.

Some question is made as to whether the name of the bank is the Cicero State Bank, as charged in the indictment, or "The Bank of Cicero." In the case of *People v. Knox*, 302 Ill. 471, after laying down the rule that it is not necessary in an indictment on a charge of robbery to allege or prove that the person from whom the property was taken was the actual owner, the opinion states: "The rule is satisfied by a showing of qualified or special property in the person assaulted in the thing taken in the robbery," citing many authorities in support of that conclusion. The indict-

ment in that case charged the money and property taken by force from one Dvorak was "then and there in the care, custody and control of said Dvorak." The indictment in the case here under consideration stated that the money that belonged to the bank was then and there in the care, custody and control of Charles C. Stoffel and that it was taken "from the person and against the will of said Charles C. Stoffel," and the allegations of this indictment were fully supported by the proof in the record. Under the reasoning and conclusion of this court in *People v. Knox, supra*, the objection of counsel for the plaintiffs in error as to the alleged variance in the record as to proof of the name of the bank must be held without merit.

Counsel for plaintiffs in error also argue in their briefs that error was committed by the trial court in refusing to give ten instructions offered on the trial in behalf of plaintiffs in error. While they set out the instructions in their briefs they do not point out why the refusal to give them was error. This court held in *People v. Hohimer*, 271 Ill. 515, that the mere statement in the briefs that the court erred in giving certain instructions amounted to no more than an assignment of error, and as no reasons were urged in support of the alleged error it was waived. If the counsel do not have sufficient confidence in their position to point out specifically wherein the alleged error exists, we will not explore the record and the authorities to find some ground on which to reverse the judgment. (*City of Benton v. Blake*, 259 Ill. 211.) Furthermore, taking the instructions as a series, it may be said that all the questions covered by instructions that were refused were covered by other instructions given by the court on the trial of the case.

We find no reversible error in the record, and the judgment of the criminal court of Cook county will therefore be affirmed.

Judgment affirmed.

(No. 14483.—Reversed and remanded.)

NELLIE I. MEES *et al.* Appellants, *vs.* MABEL STEFFEY *et al.*
Appellees.

Opinion filed April 19, 1922.

1. DEEDS—*when conveyance from child to parent is presumed to be valid—misrepresentations.* The mere fact of the relationship of parent and child where the parental dominion has ceased will not, of itself, raise a presumption of fraud or undue influence by the parent in obtaining a conveyance or gift from the child, and such a conveyance, in the absence of any other circumstances except the relationship of the parties, is presumed to be valid, but its validity may be destroyed if shown to have been procured by false representations, unfair means or undue influence.

2. SAME—*existence of fiduciary relation is not essential to set aside conveyance from child to parent.* All conveyances by a child to the parent whereby the parent secures the benefits, if unreasonable under the circumstances and not made with scrupulous good faith, will be set aside unless the rights of third parties have intervened; and the existence of a fiduciary relation, mental weakness or lack of business experience is not an essential element.

3. SAME—*when deed from child to parent is presumed to be invalid.* Where a child living under the parental roof has recently become of age, or is mentally weak or ignorant of business transactions, a deed to the parent will be presumed to have been procured by fraud, and the burden will be on the parent to prove the fairness and reasonableness of the conveyance.

4. SAME—*when bill to set aside deed from children to parent is not subject to demurrer.* A bill to set aside a deed from children to their father is not subject to demurrer where it alleges that the deed was procured by unfair and fraudulent means and was without consideration, even though the children are adults not residing with their father and although the facts alleged might not be sufficient to avoid the deed had the grantee been a stranger.

APPEAL from the Circuit Court of Stark county; the Hon. CHARLES V. MILES, Judge, presiding.

T. W. HOOPES, F. B. BRIAN, and J. H. ANDREWS, for appellants.

THOMAS J. WELCH, and JOHN W. FLING, JR., for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court:

Appellants were the owners of the undivided two-thirds of 100 acres of land in Stark county, subject to a life estate of their father, John R. Blunt. In December, 1917, "for and in consideration of one dollar and other valuable considerations," appellants conveyed to their father, by quitclaim deed, all interest in said 100 acres of land. Blunt died testate February 26, 1920. By his will he gave appellant Nellie I. Mees one-third of all his property except his household goods and automobile. To appellant Lizzie Hogg he gave the sum of \$500. To his daughter Mabel Blunt (now Mabel Steffey) he gave all his household goods, his automobile and all the remainder of his property and appointed her executrix, to serve without bond. Appellants filed their bill to the June term, 1921, of the Stark county circuit court to set aside the deed made by them to their father in 1917. A demurrer was sustained to the original bill, also to an amended bill. The bill was again amended, and the court sustained a demurrer to the second amended bill. Appellants elected to stand by their bill, and the court entered a decree dismissing the bill for want of equity. This appeal is prosecuted from that decree.

The bill as finally amended alleged appellants and their sister Mabel were in 1917 the owners of the 100 acres of land subject to a life estate of their father; that the land was worth \$10,000; that appellants did not receive a fair and adequate price for making the deed, but the price paid was inadequate and much less than the value of their interest, as will appear by the deed; that their father was a man in advanced years, and his life estate did not greatly depreciate the value of the remainder in the land; that he asked them to make a deed to him, but they refused, and in order to induce them to make the deed he attempted to hire other persons to use their efforts to secure the deed to him; that he also falsely represented to appellants that on account of his only having a life estate in the land he was unable to

obtain the necessities of life; that he also threatened appellants with violent bodily injury if they did not make the deed, and threatened to kill his daughter Lizzie if she refused to make the deed; that the appellants were induced by their father's importunities, false representations and threats to make the deed, and the bill prayed that it be set aside. The bill also alleged that after the deed was made appellants' father, up to a short time before his death, told appellants there was no use for them to resort to legal proceedings to set the deed aside and assured them that at his death they would get the land, and relying on these statements and assurances and the good faith and truthfulness of their father they refrained from bringing suit to set aside the deed during his lifetime; that after his death appellants had frequent conferences with their sister Mabel, the executrix and principal beneficiary of their father's will, and she held out the hope to them that they would be able to settle and adjust the matter so that appellants would obtain their rights in the land without litigation, and to preserve peace and good feeling in the family and relying on their sister's promises they refrained from bringing the suit until she refused to recognize their rights, when they filed their bill. The bill further alleged the land conveyed by Lizzie Hogg was the only property she owned; that Blunt at the time of his death owned personal property and other real estate sufficient to pay all his debts.

Appellants have never accepted the benefits of the will. They are both married and at the time the deed was made lived with their husbands away from the home of their father. The deed was acknowledged by Nellie Mees in South Dakota, and the briefs say she resided there. Lizzie Hogg acknowledged the deed in Henry county, Illinois, and the briefs say she resided in Stark county.

Appellants' position is, that fraud will be presumed from the relation of the parties, the inadequacy of the consideration, and the method by which it is alleged the deed was

procured. Appellees' contention is that appellants were adults not residing with their father, and in the absence of averments of the existence of a confidential relationship or weak mental or physical ability of appellants or their lack of business experience, by reason of which their father took advantage of them, the bill did not state a cause of action.

The mere fact of the relationship of parent and child where the parental dominion has ceased will not, of itself, raise a presumption of fraud or undue influence on the part of the parent in obtaining a conveyance or gift from the child. Such a conveyance, in the absence of any other circumstances except the relationship of the parties, is presumed to be valid, but its validity may be destroyed if shown to have been procured by false representations, unfair means or undue influence. All conveyances by a child to the parent whereby the parent secures benefits are objects of jealousy, and if they were not made with scrupulous good faith and are unreasonable under the circumstances they will be set aside unless the rights of third parties have intervened. (1 Story's Eq. Jur.—12th ed.—sec. 309.) The existence of a fiduciary relation, mental weakness or lack of business experience are frequent elements in such cases, but they are not essential. (2 Pomeroy's Eq. Jur.—3d ed.—sec. 951.) Where a child is living under the parental roof, has recently become of age, or is mentally weak or ignorant of business transactions, a deed to the parent will be presumed to have been procured by fraud, and the burden will be on the parent to prove the fairness and reasonableness of the conveyance. *White v. Ross*, 160 Ill. 56; *Hays v. Feather*, 244 id. 172; *Sayles v. Christie*, 187 id. 420.

Appellants are not within the above rule under the allegations of the bill, but it is alleged their deed to their father was procured by unfair and fraudulent means and was without adequate consideration. The demurrer admitted that was true. In our judgment the bill was not ob-

noxious to demurrer but stated a case which required defendants to answer. It may well be that the same facts alleged, if the grantee had been a stranger to appellants, would not have been sufficient, but the relationship between the parties is an important element to be considered. Although appellants were not living under the parental roof they were the grantee's children, and that fact rendered them very susceptible to his influence and importunities to convey the land to him. If appellants were unwilling to make the deed and their father procured it by the means alleged,—in the case of Lizzie Hogg the conveyance was of all the property she had,—and then or afterwards promised them they would get it when he died, it would certainly be inequitable to sustain it as a fair and voluntary transaction. Appellants were not entitled to the possession and use of the land until the death of their father, who had a life estate, and if he secured their title and died seized of the land without disposing of it to others by will they would have come into possession at the same time they would if they had not made the deed. Under the case made by the bill we do not think the burden of proof is cast on defendants in the first instance to show the transaction was fairly, voluntarily and understandingly made, but it is incumbent on appellants to prove at least *prima facie* their bill. If the deed was not a constructive fraud because made from children to a parent, that fact is, as we have said, an important element to be considered in connection with the facts which may be proved.

Clearly, appellants are not barred from maintaining their bill by *laches*.

The court erred in sustaining the demurrer. The decree is reversed and the cause remanded, with directions to overrule the demurrer.

Reversed and remanded, with directions.

(No. 13946.—Reversed and remanded.)

HANNAH F. WRIGHT, Appellee, vs. ALBERT UPSON *et al.*
Appellants.

Opinion filed April 19, 1922.

1. *WILLS—when former will is admissible to sustain contested will.* For a former will or declarations of a testatrix to be admissible to show that she was of sound mind and memory at the time of the execution of a contested will, such declarations and the provisions of such will must be in substantial conformity with the provisions of the contested will and be made when the testatrix is conceded to have been of sound mind and memory.

2. *SAME—evidence tending to blacken reputation of testatrix is not admissible on issue of mental capacity.* Evidence tending to blacken the reputation of the testatrix for honesty and fair dealing and to prejudice the jury against her is not admissible on the issue of mental capacity in a will contest, and such evidence cannot be made the basis of hypothetical questions put to expert witnesses.

3. *SAME—what instructions in will contest are improper.* In a will contest, instructions that if the testatrix was incapable of knowing the natural objects of her bounty the jury should find that she was incompetent to make a will are improper, where there is no evidence that she did not know the natural objects of her bounty; nor should the court give a long and involved instruction to the effect that to have sufficient capacity to make a will the testatrix must have had the power to retain in her mind all the elements of the transaction for a sufficient time to form a rational judgment.

4. *SAME—when hospital records are admissible on issue of patient's mental capacity to make will.* In a will contest case, the records of a hospital where the testatrix was a patient during her last illness, a few months after she had executed her will, and where she executed a codicil, are admissible on the issue of mental capacity only after proof of their correctness as books of account; but nurses who made the records may refresh their recollection from their own notes and testify as to the mental and physical condition of the testatrix.

5. *SAME—court must see that guardian ad litem makes proper defense.* In a will contest case it is the duty of the guardian *ad litem* appointed to represent infant defendants to make only a proper defense and to incur no unnecessary expenses in making the same, and it is the duty of the court to see that no unnecessary or improper defense is interposed and that the interests of the infants are protected.

6. *SAME*—reasonable guardian *ad litem*'s fee may be taxed as costs in contest case. In a will contest case, a guardian *ad litem* appointed to represent infant defendants is entitled to a reasonable fee for making a reasonable and necessary defense, and it is proper to tax such fee as costs against the estate.

7. *SAME*—how fees of guardian *ad litem* should be determined. In a will contest case the fee of a guardian *ad litem* appointed to represent infant defendants should be fixed by the testimony of attorneys as to what is a customary fee for the same services in cases wherein the fee is the subject of contract between the solicitor and a client, but the court is not bound by the testimony of the attorneys as to what is a proper fee if it appears to be unreasonable.

APPEAL from the Circuit Court of Fulton county; the Hon. G. O. DIETZ, Judge, presiding.

ROBERT C. WOOLSEY, CHARLES J. SCOFIELD, and HARVEY H. ATHERTON, guardian *ad litem*, for appellants.

BURNETT M. CHIPERFIELD, and CLAUDE E. CHIPERFIELD, for appellee.

Mr. JUSTICE DUNCAN delivered the opinion of the court :

Hannah F. Wright, appellee, filed her bill in the circuit court of Fulton county against Albert Upson, Sarah M. Hummel, Martha L. Taylor, Sarah Burnhart, George Upson, Tat Bailey, Lantz Hitz, Clarence Hitz, Marjorie Hitz, Frances Hitz, George L. Upson, Rolland W. Upson, William A. Upson, Lucy N. Upson, Nellie U. Freet, Mae U. Noble, Robert Wells, the Board of Trustees of the Presbyterian Church of Table Grove, Illinois, and Gabrelia L. Hughes, individually and as executrix of the last will and testament of Lucy M. Wright, deceased, praying that the alleged will of Lucy M. Wright of July 11, 1916, and the codicil thereto of November 18, 1916, which were admitted to probate in the county court of that county, be declared null and void and that the probate thereof be set aside. The issues framed for the jury to pass on were,

(1) was the alleged will and the codicil thereto, together, the last will and testament of Lucy M. Wright; and (2) was the alleged will of July 11, 1916, the last will and testament of Lucy M. Wright. Albert Upson, Gabrelia L. Hughes, as executrix, and H. H. Atherton, as guardian *ad litem* appointed by the court for the infant defendants, George L. Upson, William A. Upson, Rolland W. Upson, Lucy N. Upson, Clarence Hitz, Marjorie Hitz and Frances Hitz, answered the bill. All of the other defendants made default except George Upson, whose death was suggested on the record. The issues were tried by a jury, and the jury found that the will and codicil are not the last will and testament of Lucy M. Wright. Albert Upson, Gabrelia L. Hughes, executrix, and the minor defendants by their guardian *ad litem*, filed a motion for a new trial, but the same was withdrawn as to the executrix on the ground that her attorney had no authority to file the same. The motion for a new trial was overruled, and the court entered a decree setting aside the will and declaring the same void, and fixed the sum of \$2000 as the guardian *ad litem's* fee, to be taxed and paid out of the assets of the estate, for his services performed in the suit as guardian *ad litem*. The costs of the suit, exclusive of the guardian *ad litem's* fee, were ordered to be taxed against certain defendants and proponents, as follows: 13/40ths against Albert Upson; 6/40ths against Gabrelia L. Hughes, executrix; 20/40ths against the infant defendants, George L. Upson, William A. Upson, Rolland W. Upson and Lucy N. Upson; and 1/40th against the defendants Clarence Hitz, Marjorie Hitz and Frances Hitz, and that executions issue therefor. Albert Upson, and all the infant defendants in the suit by their guardian *ad litem*, have appealed.

Lucy M. Wright died January 22, 1917, at the age of seventy-seven years, leaving Albert Upson, her brother, Sarah M. Hummel, Martha L. Taylor and appellee as her sisters and only heirs-at-law. She died seized and pos-

sessed of a farm of 400 acres, of the value of \$70,000; her homestead property in Table Grove, consisting of her dwelling house and three lots and part of another, of the value of \$5000; two lots in Galesburg, of the value of about \$3000; and personal property of the value of about \$12,000. She was the widow of Granville Wright, who died March 8, 1906, at the age of eighty-six years. Wright was a man of affairs and at one time during his marriage with testatrix owned considerable property, including the 400-acre farm of the testatrix, but he suffered financial reverses and lost most of his property, including his farm, which he sold to one Washburn. The testatrix and her husband then leased the farm from Washburn for three years, and at the end of that time the testatrix bought the property of Washburn and incurred very heavy indebtedness in the purchase of it. It does not definitely appear when she purchased the farm, but from the showing in the record it was probably about the year 1893. From the time she purchased it she managed and controlled it and did a great deal of hard labor on the farm that only men are accustomed to do. She proved to be very successful and a very shrewd manager and business woman on the farm, and through her management and business methods and very strict economy she succeeded in paying her debts and accumulating the property of which she died possessed, including some property that she owned in her own right at the time she purchased the farm. She was very saving and penurious and continued to be so up to her death, and denied herself many comforts in the way of food and clothing, even at the times when she was well able to enjoy such comforts, and even luxuries, had she been disposed to do so. She wore very common clothing and shoes during work days and continued to wear them until they were old and worn and ragged, and often they were not sufficient to protect her from exposure to inclement weather, but on Sundays she would dress in neat and better clothing and more

suitable to her condition in life. She had at all times renters on her farm, and she was particular to dictate and detail in the leases the crops that were to be raised by them, and generally reserved in her leases a room or rooms and a barn or place to store her grain. She was very watchful of her own interests, and at all times insisted that the grain raised on the farm should be weighed so that she would get the exact amount of her rent. She moved to her residence in Table Grove in January, 1911, and continued to reside there until her death, but she continued to visit her farm often, up to and including 1915 and part of 1916, and kept close watch on her tenants and what was done on the farm, and was so strict and so exacting in the division of the rents and her supervision over her tenants as to incur the disfavor, and even the hatred, of several of them.

During the time that testatrix and her husband were living on their farm, about 1881 or 1882, her husband had two grandchildren, Gabrelia Love, (now Gabrelia L. Hughes, the executrix,) and Sarah Love, (now Sarah L. Burnhart,) who were orphans and of whom at that time he took the custody, and they continued to live with him and the testatrix until his death, and after his death they lived with the testatrix until their marriage. These two girls were treated by the testatrix as her children and with very great consideration, unquestionably up to the year 1914, and she sometimes referred to them as her adopted children, although they were not, in fact, adopted. Sarah was about seven weeks old and Gabrelia about ten years old when they were taken by their foster parents on the farm. They proved to be very bright, energetic and useful girls, and they did a great deal of work on the farm while they were there, under the management and control of the testatrix. The testatrix was, in fact, very successful in getting all parties under her control and associated with her in farm work to do good work for her and with very beneficial results.

In May, 1914, while on a visit to her farm, the testatrix received a fall which caused an injury to her arm, shoulder and head, and she thereafter complained of severe pains in her arm, neck and head and sought practitioners of various branches of medical science for aid, relief and treatment. In July, 1916, she was examined by her physician and found to be afflicted with arteriosclerosis, and at that time had a systolic pressure of 170 and a diastolic pressure of 100, which indicated considerable hardening of the arteries. In 1915 she was examined by an eye specialist and found to be afflicted with a cataract on each eye, which very materially affected her vision. In July, 1916, she was operated on for cataract of one eye in a hospital at Peoria and remained there for two weeks. After her return home from the hospital she was under the care of a professional nurse for three or four weeks and was weak and prostrated. She had her eyes bandaged during that time. In the month of November, 1916, she sustained a fall and fractured the neck of the femur. She was then removed to a hospital in Galesburg, where she remained until she died, in January, 1917. From 1914, after she received her fall, and perhaps for a short time before that, until she was operated on for cataract of the eye and until she was injured in November, 1916, suffering a fractured neck of the femur, Sarah Burnhart and her husband assisted her very greatly in transacting her business on the farm and her banking business. They drew checks for her on the bank at her request and she signed them. She was in the habit at all these times of referring parties to Sarah and her husband and of consulting them for advice, and she would consult others for advice but usually made the conclusion as to what was to be finally done in different matters. During the time she was in the hospitals at Galesburg and Peoria, Sarah and her husband looked after all of her business, but she continued to sign checks while she

was in both hospitals in July and November, 1916, payable to her nurses, doctors, the hospitals and to others.

By article 1 of her will the testatrix devised to her executors, as trustees, her homestead property in Table Grove and her property in the city of Galesburg, to have, hold, manage and control, and to sell, at their discretion, with directions to invest the proceeds in good real estate first mortgage loans. The income of all of said property by the terms of the will is to be used for the support and maintenance of her sister Martha L. Taylor while she lives and for the payment of the expenses of said sister's last illness and funeral expenses. At the death of her sister the income shall be used and applied as her executors and trustees shall deem necessary, from time to time, to educate the children now born or hereafter to be born to the testatrix's nephew, George Upson, as they arrive at proper school age, with full power and authority to so use such proceeds until the youngest of said children shall have received a high school education or its equivalent, and then the remainder of the proceeds is to be divided, share and share alike, *per stirpes*, among the children or their descendants of George Upson who are living at that time, and to have and to hold forever. By article 2 of her will her executors and trustees are directed to sell and convey, as soon after her death as they shall deem wise and prudent, to the highest bidder at public sale, all of her farm land of which she shall die seized, and to invest one-half of the proceeds thereof in farm lands in Knox county, Illinois, the title to the same to be taken in the name of her nephew, George Upson, to have and to hold during his natural life, only, and at his death the same to go to his children and their descendants, share and share alike, *per stirpes*. The land so devised to Upson for his natural life is upon the express condition that he will not lend any financial aid to Gertrude Upson, wife of Arthur E. Upson, and if he does lend such aid, directly or indirectly, she directs that the

land shall pass to his children the same as if he were dead. By article 3 the remaining one-half of the proceeds derived from the sale of her farm land is disposed of by the same terms and conditions and in the same manner as the proceeds of her homestead and other lots were disposed of by article 1, after first paying her just debts, funeral expenses, costs of administration, including costs arising from the sale of the land and the specific pecuniary legacies bequeathed by the testatrix and hereinafter mentioned. By articles 4, 7 and 8 she bequeaths to Sarah Burnhart, "for whom I have cared from her childhood," \$600 in cash, "having already given to her a twenty-five hundred dollar home on conditions mentioned in said deed, the two gifts to constitute a complete payment to her of all services rendered to me during my life and shall be so accepted by her." She also bequeathed to Sarah "Leila's picture and her own picture, my aquarium, and the old bureau which belonged to grandfather Wright, to have and to hold forever." She bequeathed to Gabrelia L. Hughes, "for whom I have likewise cared from her childhood, the sum of \$600, conditioned that no extra bill for services be charged against my estate." She also bequeathed to Gabrelia "my large looking-glass in the sitting room and my gold watch." By article 5 she bequeathed to her sister Sarah M. Hummel the sum of \$1000 in cash. By article 6 she bequeathed to her sister Martha L. Taylor all her household furniture of every kind and character, including her piano, the canned fruit in the cellar, dishes, and all other household goods about the home where she resided in Table Grove, to have and to hold forever. By article 8 she bequeathed to Hannah F. Wright and to her brother, Albert Upson, one feather bed each; to the Presbyterian church of Table Grove \$50 in cash; to Tat Bailey, a friend, one-half dozen of her best silver tea spoons, to be selected by her executors; to each of the three children of Lantz Hitz the sum of \$25 as they arrive at their majority; and to Lantz Hitz

the contents of "the barn and shed, except the grain and hay." By articles 9 and 10 the will provides that in case she sells her Galesburg property prior to her death the proceeds thereof shall be disposed of by her executors under the same conditions mentioned in article 1. In case any person or persons named in her will shall contest or assist in contesting the validity of the will such person or persons shall receive no part of the estate, and any provision made for such person shall become void and the property therein mentioned become a part of the residuary estate. By article 11 she nominated Gabrelia L. Hughes, James W. Lantz and B. F. Arnold, of Galesburg, as executors and trustees, and in case of the refusal to act or the death of any one of the executors and trustees she authorized her sole surviving trustee to carry out the provisions of the will. After the estate is administered upon and all the real estate sold, the trustee or trustees handling the trust fund shall receive a reasonable compensation for the same but not a per cent on the principal of "said money," and she further directed her executors to employ E. P. Williams, of Galesburg, as their counsel and attorney in handling the estate and that he be paid reasonable compensation, and in case of his death or inability to serve she named his partner, J. D. Welsh, as attorney. The attesting clause is signed by Mary Scott, Mabel G. Gabrielson and Harriet C. Peterson, of Galesburg, and it recites that the will was subscribed, published and declared by her as her last will and testament in their presence, who at her request and in her presence, and in the presence of each other, subscribed their names as witnesses thereto, and that they believed her to be of sound mind and memory and under no constraint at the time of so signing the same.

The codicil of November 18, 1916, ratifies and confirms all the provisions in a codicil made June 15, 1916, drawn by attorney E. P. Williams and witnessed by Mary Scott, Mabel Gabrielson and Harriet Peterson, except that she

gives, devises and bequeaths to Sarah Burnhart the lots adjoining her homestead after taking out "the west two lots of that homestead, which I do not desire to give to her; on this reserved property is my house." By the codicil of November 18 she also changes the executors of "my last will so that they shall remain as B. F. Arnold, Galesburg, Illinois, my sister Sarah M. Hummel, and Mrs. Gabrelia L. Hughes, of Table Grove, and none others." She also thereby revokes and cancels any codicil or proposed codicil purporting to be made "by me betwixt June 15, 1916, and the present date." The codicil of November 18 was witnessed by Mary Scott, Hannah E. Erickson and Nelle Johnson. The attesting clause recites that the codicil purporting to be the second codicil to her last will and testament (of July 11, 1916,) was signed by her in the presence of said witnesses, and that they in her presence, and in the presence of each other, signed the same as witnesses, and at the signing and sealing of the same she was of sound mind and memory.

There is evidence in the record tending to prove that the codicil of June 15, 1916, was lost and could not be produced at the trial. A carbon copy of this codicil was produced on the trial except as to the signatures of the attesting witnesses and the testatrix. This codicil does not state on its face to what will it is a codicil, but from the evidence of lawyer Flack, who drew for the testatrix a will on June 16, 1916, it is a codicil to a will drawn by lawyer E. P. Williams between the dates of April 23, 1914, and June 15, 1916. This codicil by its terms reduces the amount theretofore bequeathed to the testatrix's sister Sarah M. Hummel, "to the sum of \$1000 and no more." By it she bequeathed to Sarah Burnhart and Gabrelia Hughes each the sum of \$500 in cash, conditioned that "no extra bills for services be put in," and recited that both of the legatees have remained "my faithful friends." By the third clause of her codicil she devised her homestead property

in Table Grove and her lots in Galesburg to her executors named in her will and to their survivors as trustees, to have, hold and manage, control and sell the same at their discretion, and to apply the proceeds thereof first for the use and benefit of her sister Martha L. Taylor, while she lives and to the payment of the expenses of her last illness and the funeral expenses after her death, and to have and hold the remaining proceeds after the death of her sister in trust in assisting her nephew, George Upson, in the education of his children, born and to be born, as they shall from time to time be of proper school age, and when the education of the last one of said children shall be satisfactorily completed, the remaining surplus is to be divided ratably among the surviving children, share and share alike.

The testatrix executed a number of wills during the last five years of her life. Her first three wills were drawn by Margaret M. Stewart,—two in 1911 and the third about 1912. She executed a codicil to each of the two first wills. She applied to Miss Stewart about 1914 to make a codicil to the third will, but she declined to write it and recommended that she have a lawyer write it. She executed her fourth will April 23, 1914, drawn by attorney Woolsey, which is known in the record as the Woolsey will. Lawyer E. P. Williams drew her fifth will between the dates April 23, 1914, and June 15, 1916, to which he also drew a codicil June 15, 1916, which is the codicil referred to and ratified by the codicil of November 18, 1916. Attorney C. W. Flack drafted her sixth will June 16, 1916. Attorney Williams drafted her seventh will on July 11, 1916, which is the will above set forth and contested in this suit, and also the second codicil thereto of November 18, 1916, also contested. The first codicil to this will was drawn July 20, 1916, and is the one referred to as revoked by the second codicil of November 18, 1916. The Woolsey will of April 23, 1914, exhibited the same general plan of the testatrix that is found in her last will and testament, the greater part of the prop-

erty of which she died seized and possessed being devised to George Upson and his children after the manner of the devise thereof in the seventh or last will, the difference in the two wills being mainly as to the gifts to the legatees and as to other provisions, the differences in the wills being inconsequential. The Flack will of June 16, 1916, was in its provisions with regard to legacies and devises identical with the provisions of her last will and testament as to such legacies and devises, except that the Flack will contained a residuary clause, by which the testatrix gave all the rest and residue of her property, of every kind and nature, to her brother and sisters, share and share alike, but the record shows that by her last will she specifically bequeathed and devised about all the property of which she died seized or possessed. The testimony of Flack discloses that a large number of the provisions of the Flack will were in the identical language as the previous will prepared by Williams between April 23, 1914, and June 15, 1916; that there was some little change in the will, and the testatrix expressed to him at that time that she did not want Gertrude Upson to have any interest in or be benefited in the least by anything that she had. The differences in the Flack will and in her last will not already mentioned are, that Flack was named as attorney in the will he wrote and Williams was named as attorney in the will he wrote, and there was also some slight difference by the changing of the name of one of the executors and trustees, made at her direction.

Fifty witnesses testified on behalf of proponents of the will, and nearly all of them testified in support of the contention that testatrix was of sound mind and disposing memory at the time she executed the alleged will of July 11, 1916, and her codicils to that will. Thirty-six of those witnesses expressed the opinion that she was of sound mind and memory at or near those times, after properly qualifying themselves to express an opinion. Five of those were

regularly licensed physicians who were acquainted with her and had treated her both before and after she executed the will. One of them saw her on that day, when she visited and consulted him at his office about her injured shoulder. He also saw her and conversed with her about her injury and condition on November 16, 17 and 18, 1916, the first time being at her home and the last two times at the hospital at Galesburg, being the day before and the day on which she executed her second codicil to the will. Another one of these physicians visited her professionally on November 15 and 16, 1916, after she had sustained a fracture of the femur. The others of the thirty-six witnesses included lawyer Flack, who drafted the will she executed in his office June 16, 1916; his stenographer; the attesting witnesses to the will of July 11, 1916, and of the codicils thereto; her bankers, merchants, farmers and neighbors of Table Grove and in the county, most of whom had known her for many years intimately and had visited and associated with and transacted business matters of various kinds for her. Proponents also put in evidence more than 140 checks signed by her in person on banks in which she had deposited her money. Fifty-three of these checks personally signed by her were signed in 1916, eight in June, eight in July, five in November and eight in December, 1916. Ten of the personal checks were signed by her in April, May and June, 1914, and eighty during the year 1915. Many of the checks were payable to various witnesses for appellee, who testified that testatrix was of unsound mind and memory in 1914 and her gradual weakening thereafter, both mentally and physically, until her death. There was also introduced evidence leading up to the giving of some of these checks. The testimony shows that E. P. Williams dictated the will and codicil of July 11, 1916, and November 18, 1916, to his stenographer in the presence of testatrix, after being informed by her as to how she wanted the will and codicil written, and when the will was written

she particularly requested that the will be made right with the Upson children, as they were poor and she wanted them to have an education in life. The will was read over to her by Williams before she signed it. While Williams was dictating the codicil at her request she corrected him as to the location of the house with reference to the barn and told him where the house stood and where the barn stood, and thereby enabled Williams to correct a mistake and to correctly describe the premises therein devised to Mrs. Burnhart.

It is the contention of counsel for appellants, supported by the testimony of their witnesses, that testatrix was a school teacher before she married Granville Wright; that although eccentric and peculiar in some of her ways she was of very strong mind and of a very saving disposition; that she possessed unusual acumen and business judgment, and was very successful in the transaction of all of her business matters from the time she bought and took over the management of the farm until she was injured by the fracture of the femur, in November, 1916; that there is not a single instance in which she failed to exercise good judgment and business management, and she never at any time sustained a loss or permitted her business to suffer for want of good, sound judgment to transact it. They also contend that although the testatrix during some of the time when she was in the hospitals at Galesburg and Peoria was physically disabled from transacting her business, she was of sound mind and memory not only up to the time she executed her will and codicils but even through December, 1916, and that her final collapse and mental decline were caused by very great suffering and the delirium occasioned therefrom. While admitting that testatrix was temporarily delirious during times she was in the hospitals, by reason of pain and suffering and the effect of medicines, they contend that the will was executed before these times and when she was mentally sound, and that the codicil of No-

vember 18 was executed on a day and at a time when she was free from delirium and well understood what she was doing and knew just what she wanted put in the will and the codicil.

Twenty-six witnesses testified for appellee that testatrix was of unsound mind and memory. At least three of these witnesses confined their testimony to the year 1916 and had not known or seen her prior thereto. One of these was a registered nurse at the Galesburg hospital, who only saw and observed her while she was there, and this witness, Hannah Erickson, witnessed the codicil of November 18, 1916. Previous to this testimony she testified in the probate court as an attesting witness that the testatrix was of sound mind and memory, and her testimony was admitted on the trial for the proponents as an attesting witness. She testified on this trial that she believed at the time she witnessed the will the testatrix was then of sound mind and memory, and she had signed the attesting clause expressing the same opinion but said that she had changed her mind since then. Another one of these three witnesses was the superintendent of the Galesburg hospital, who testified that she had visited the testatrix November 16, 1916, and up to her death, but had no conversation with her. She based her opinion that she was of unsound mind and memory upon the fact that she was delirious much of the time, and that she talked incoherently at times and when no one was engaging her in conversation. She also testified that a great deal of this time testatrix suffered a great deal of pain from her injuries, and stated that she did not pretend to be an expert on insanity. The other of these three witnesses, who examined her eyes in April and in July, 1916, as an eye specialist, based his judgment that she was not of sound mind upon her statement to him that she was poor and on her rambling talk. On cross-examination he stated that he did not charge her for the first trip but did charge her for the second treatment and accepted her check. He had

found out from another doctor that "he had got stung," referring to the fact that he had learned that she had considerable property. He also stated that he was not an expert on insanity.

Four physicians who are experts on insanity, who had never known the testatrix, testified in answer to a hypothetical question that she was of unsound mind and memory during the whole of the time covered by the facts stated in the question, which covered the years from about 1905, or prior thereto, until her death. All of the other witnesses, except three, testified that the testatrix was of unsound mind and memory and confined their testimony to the years 1915 and 1916, generally, and none of them testified as to unsoundness prior to the year 1914. One of these witnesses confined her testimony to a few weeks in 1915. She was a niece of the testatrix, her name being Mary Taylor, was thirty-five years of age and the daughter of testatrix's sister Martha. Another one of these witnesses, Sarah Burnhart, who lived in the house adjoining the homestead of the testatrix and who saw her almost every day in 1914 and 1915, expressed the opinion that she was of unsound mind and memory during those years, and confined such testimony to the time of the testatrix's injury in 1914 up to her death, in January, 1917. The substance of her testimony is, that after the testatrix received her fall, in May, 1914, witness observed a change in her mental and physical health and that she almost constantly complained of pain about her head. This witness is one of her foster daughters, who is a legatee in the will and who had lived with the testatrix, or near her, since she was seven weeks old, and when she testified she was thirty-eight years of age. She also testified that she had not been promised anything if the will was set aside.

Of the three witnesses whose testimony as to unsoundness extended over a period of more than the three years aforesaid, one was a dentist, who expressed the opinion that

the testatrix was of unsound mind and memory about the year 1913. The other two of these three were tenants of the testatrix on her farm and who disclosed by their testimony that they had very bitter feelings toward her. One of these tenants testified rather reluctantly, after being pressed to it, that he would have to say that she was of unsound mind at times during the years 1912 and 1913, and he based his testimony upon his having seen her "do little things that I thought a person that was in their right mind wouldn't do." The particular thing he related that she did that was unusual was the breaking up of hen's nests by putting sticks and other things in the nests. At another time he told about her driving a sick cow that belonged to him out of her lot, this being repeatedly done by her on the day the cow was sick after he would drive her back into the lot. Another unusual thing that she did was to take a little more straw than he thought belonged to her from a stack of straw belonging to both of them, after the stack had been divided by cutting it in halves. He also saw her when she was out at the farm pick up old pieces of boards and shingles and fill her buggy with them and take them home with her. The other tenant testified that testatrix was of unsound mind and memory in 1910 and 1911, while he was a tenant on her farm. He based his testimony upon the fact that she was what he called "childish" and did not "sustain a connected conversation with" him. He said he could not explain it, but that she would go right along. One day she would have one proposition about the things on the farm and the next day she would have another, and that she would change from one day to the next. He confined his testimony, as also did the other tenant, to the times they were tenants on the farm. This witness was very bitter toward her, and expressly stated that he never talked to her unless he had to. He also spoke of another time when he asked her for staples and nails to build a fence that she would bring them in small

amounts, but that he usually got what he wanted from her except as to this fence.

One of appellee's witnesses who had known the testatrix twenty-eight years testified that she was pretty keen and shrewd in business matters up until the last two or three years of her life. Another of appellee's witnesses who had known testatrix all her life testified that she was all right when she was on the farm, and that she was of sound mind then before she moved to town and that she wore old clothes during that time. Still another witness for appellee who had known the testatrix for forty years, and who testified that she was of unsound mind and memory in the last two or three years of her life, testified that he did not know of any business transaction that she ever had in which she did not take care of herself; that she knew what to do and how to do to take care of herself in business matters; that she was very shrewd and keen in business matters, and that up to the very last time he saw her she retained control over her property matters and had the final say in those matters but counseled with her two foster daughters.

The facts relied upon by appellee to establish mental unsoundness of the testatrix, and upon some one or more of which various witnesses for appellee based their opinion that she was of unsound mind and memory, are the following: Her physical condition and suffering from her injuries and surgical operations already related, it being their claim that for the last three or four years of her life she was on the decline, mentally and physically; that she walked with a feeble and infirm step and quickly became weary and required much rest; that when seated she got up with great difficulty and sometimes required assistance to get up; that she suffered from arteriosclerosis, and from pyorrhea, occasioned by bad teeth; that she was possessed of false notions at various times that she was poor and had no property, and therefore wore bad and insufficient clothing and shoes, and at times thought the water in

one of her wells and some of her food were poisoned, and various persons, including some of her closest friends, were scheming against her and trying to do her injury; that she frequently cried during these times and was incoherent and disconnected in her conversations, often repeating the same remark and forgetting the subject of her conversation; that she was eccentric, peculiar and irritable, and frequently made expressions that her mind was failing and that she could not trust herself to transact her business properly, and would frequently lose or misplace various articles and would not be able to find them. It is also claimed that she made a number of wills and codicils and frequently changed them during the last five or six years of her life, and that was a further evidence of insanity or unsoundness of mind. There were other facts relied upon as such proof which appellants claim occurred at times when she was unquestionably of sound mind, and that such facts were no indication of insanity and were improperly admitted to establish such facts, which will be considered later in this opinion.

Upon the question of the sufficiency of the evidence in this record to establish either mental soundness or unsoundness of the testatrix during the last five or six years of her life we express no opinion, and it would be improper to do so in view of the fact that the judgment must be reversed for errors appearing in the record. It is proper to state, however, that there is absolutely no testimony in the record given by any witness that shows or tends to show that she was of unsound mind and memory prior to the years 1910 and 1911. The overwhelming weight of the evidence of appellee, as well as that of appellants, is to the effect that she was of sound mind and disposing memory at all times prior to the years 1912 and 1913, as already indicated. The positive testimony of Sarah Burnhart, her foster daughter, who had lived with her or by her and saw her every day, or about every day, for thirty-eight

years, and who had the best opportunity of anyone to know, and whose testimony was given for and whose sympathy was clearly with appellee in this case, is to the effect that she discovered nothing in the testatrix's conduct or actions that indicated unsoundness of mind prior to May, 1914, when she received her injury to her shoulder, neck and head. She positively testified that before the latter part of April, 1914, the testatrix never had the belief that the water in her well was poisoned, and she further testified that testatrix had always been in the habit of gathering up bolts and taps and old buckets, and other such things, and saving them; that that was her characteristic, as she did not want anything to go to waste, and she explained this on the ground that she was very close and saving,—so close that she was miserly,—and that this habit grew on her as she got older. A chiropractic physician testified that the testatrix's belief that she had at times lice on her head was occasioned by the fact of the injury to her shoulder, head and neck in May, 1914, and that that injury produced a crawly feeling or sensation in the scalp which made her really feel as if there were lice, insects or vermin crawling on her head. The facts that she wore ragged clothing, unsuitable to her condition, and that she collected and saved bolts, nuts and various things of little consequence or value, and was saving, and did other acts that indicated closeness and stinginess to a degree that might be characterized as niggardly, furnish the basis, or the chief basis, of the testimony of several of the appellee's witnesses to the effect that she was of unsound mind. In fact, there are a number of transactions recited in the record by appellee's witnesses, at times when testatrix was unquestionably of sound mind and memory, that simply show her to be stingy and miserly to such an extent as to make the question of her honesty in dealings very questionable at times, and that is really all that such evidence tends to prove. For instance, the facts testified to by W. L. Strode that she would not

allow him to have his sick cow in her lot, and that she broke up hen's nests, and that she destroyed about fifteen guineas for J. W. Strode in 1910, and cut off the pumpkins on several acres of pumpkin vines while J. W. Strode was her tenant, were of this character of evidence, and she was evidently moved to do those things because she regarded them as nuisances and harmful to her interests on the farm; that the cow, the guineas, hen's nests, pumpkins, etc., were no source of revenue to her. Testimony of a similar character is that of W. L. Strode that she took more than her half of the straw in the straw pile after it was halved, and that she had a personal contest and falling out with Albert Upson concerning the division of rents about the year 1901 or before, in which latter difficulty Upson struck her because she was interfering with his getting part of his son's rent wheat.

The first error assigned and argued by appellants is, that the court erred in refusing to permit them, on rebuttal, to introduce in evidence the Flack and Woolsey wills, executed by the testatrix in 1916 and in 1914, and which they offered for the purpose of showing that she was of sound mind and memory at the time she executed the will contested in this suit. Their claim is that the provisions of these two wills are in substantial conformity to the will in question, and which claim, for the purposes of this ruling, may be conceded. Appellee objected to the introduction of these wills for the purposes aforesaid on the ground that they were not executed at a time when the deceased was conceded to be competent to make a will, and that the evidence of appellee tends to prove that at those times the testatrix was not of sound mind and memory. The testimony of appellee, as already disclosed, did tend to show that the testatrix was of unsound mind and memory during the year 1914 and from that year until her death. The rule is well established that in order for former declarations or former wills executed by the testator to be admissible for the

purposes aforesaid, such declarations and the provisions of such wills must be in substantial conformity with the provisions of the contested will and be made or executed at times when the testator is conceded to have been of sound mind and memory. (*Nieman v. Schnitker*, 181 Ill. 400; *Dillman v. McDanel*, 222 id. 276; *Kaenders v. Montague*, 180 id. 300; *Hill v. Bahrns*, 158 id. 314.) The reasons for the rule are obvious. If such former declarations and former wills were executed at a time when the testator was unquestionably of sound mind and disposing memory they furnish very strong evidence of the soundness of mind of the testator at the time the will in question was executed, but if the soundness of mind of the testator is questionable at both times, a conclusion or presumption of soundness of mind does not naturally follow. The court therefore properly refused to admit these two former wills in evidence for such purposes.

Over the objection of appellants Sarah Burnhart testified for the appellee that the testatrix compelled Granville Wright, her husband, to remain up-stairs in their house on the farm for a period of several months prior to his death although he wanted to stay down-stairs and read; that the room in which she kept him was a small room with no toilet articles or facilities, and she would only let him come down to his meals; that she would not allow him to use tobacco, and would take it out of his hands or out of his pockets, if he had any in his pockets. She also testified that she told the testatrix she had no reason to treat Wright that way; that the testatrix replied that she wanted to know where he was. This witness also testified that Wright's mental condition was very bad for the last two months of his life, and that he would wander around and away from home unless he was confined. Not only was this testimony admitted against the objection of appellants, but other witnesses were permitted to testify to the same facts, and to further acts of the testatrix requiring Wright

to do considerable work when he was very old and not very able to work. These acts occurred in 1905 and 1906, at which times there is no claim or evidence on the part of appellee tending to show that she was of unsound mind. This evidence only tended to blacken the reputation or character of the testatrix and to prejudice the jury against her, and it had no proper place in the record as it did not tend to establish any fact in issue in the trial. We have already related other facts that were admitted in evidence over the objection of the appellants that tended to blacken the reputation of the testatrix for honesty and fair dealing, which acts had no tendency to prove any issue in the case and occurred at times when the testimony of even the appellee failed to show or tend to prove that she was not of sound mind and disposing memory. These same facts, or about all of them, were incorporated in the hypothetical question submitted to the four expert physicians, none of whom were ever acquainted with the testatrix, and in answer to the hypothetical question they all testified, in substance, that she was of unsound mind and memory during the whole time covered by the hypothetical question, which was from about 1903, or earlier, up to the time of her death. The testimony of the experts also clearly showed that their opinions were based, in part, upon such irrelevant and improper testimony. We can scarcely conceive of any character of evidence that would be more prejudicial to appellants than the testimony aforesaid. The only purpose or effect of such testimony was to exhibit the frailties or moral delinquencies of the testatrix, and such evidence has been frequently condemned by this court. *Snell v. Weldon*, 239 Ill. 279; *Graham v. Deuterman*, 217 id. 235; *Rowcliffe v. Belson*, 261 id. 566.

Three instructions offered on behalf of appellee advised the jury that if the testatrix did not know or was not capable of knowing the natural objects of her bounty they should find that she was incompetent to make a will. There

was no evidence in the record that warranted the giving of these instructions, as the only evidence upon the subject was to the effect that she did know the natural objects of her bounty at the time she made the will. Two of these instructions also advised the jury that the testatrix must have a sufficiently active memory to collect in her mind the elements of the business she was transacting in making her will and to hold them in her mind for a sufficient length of time to perceive their obvious relation to each other and to be able to form a rational judgment with reference thereto, and that if she did not understand the nature of the act or business in which she was then engaged or the kind and extent of her property or her relation to those who were the natural objects of her bounty and the general scope and bearing of the provisions of her alleged will, and did not have sufficient memory to collect in her mind the elements of the business which she was then transacting in making the alleged will and to hold them in her mind for a sufficient length of time to perceive their obvious relation to each other and to be able to form a rational judgment with reference to them, the jury were instructed that she was not of sound mind and disposing memory, within the meaning of the law, at the time of the making of the will. The foregoing propositions are by no means a lucid statement of the law and were calculated to mislead the jury. Similar instructions have been condemned as misleading and as presenting a standard far above that which the law requires to make a valid will. *Carpenter v. Calvert*, 83 Ill. 62; *Norton v. Clark*, 253 id. 557.

Over the objection of appellants the complete record of the hospital at Galesburg, compiled by the registered nurses and pertaining to the testatrix and her physical and mental condition, and all foods, treatments and medicines administered to her during the time she was in the hospital, was admitted in evidence on behalf of appellee. Assuming, but not deciding, that some portions of this record might

have been admissible if the proper proof had been furnished as to the same, there is much in the record that had no sort of bearing on the issues in the case, as is clearly apparent. The admission of the entire record by the court was erroneous for the further reason that the hospital record was the product of two or more registered nurses, each nurse making entries only at the time and for the time during which she nursed the testatrix. Only one nurse, Miss Erickson, was called to testify as to the correctness of the entries made by her and as to the times they were entered. There is no such proof of the entries made by the other nurse or nurses, and there was no showing in the record that the other registered nurse or nurses were deceased or out of the jurisdiction of the court. If the hospital record is admissible at all it is for the same reason that books of account are admissible and the same character of proof is required, and all persons who make entries therein are required to testify to their correctness before they are admitted in evidence. In a contest like this, evidence as to the physical and mental condition of the testatrix while in the hospital shortly before and after the time of the execution of the second codicil, is admissible, and there is much reason for allowing the nurses who made this record and who know the correctness of it, to refresh their recollection from their own notes and to testify as to the mental and physical condition of the testatrix at this time. There are many reasons why such notes or entries should not be admitted as original evidence, and we are clearly of the opinion that the record in this case ought not to have been admitted, or any part of it, not only for the reasons aforesaid, but for the further reason that many of the entries merely amount to conclusions of the nurses. We might say, generally, that there are cases in which a hospital chart would be admissible in evidence against a party where there is any showing or reason why one of the parties should be bound thereby, as in case of a suit against a surgeon, where it is

alleged that he wrongfully and negligently operated on a patient or wrongfully or negligently treated the case, where the chart or record was kept by the nurses for his information. There is no such reason why the testatrix or any party to this suit should be bound by the record of the hospital in this suit. An interesting and instructive note is to be found upon this subject following the case of *Osborne v. Grand Trunk Railroad Co.* Ann. Cas. 1916C, 74.

Complaint is made by appellants that during the trial attorneys for appellee made repeated statements and remarks in the presence of the jury calculated to belittle one or more of the opposing counsel and to question their sincerity and integrity, to frighten and unnerve witnesses, and even conduct that was disrespectful to the court and calculated to divert the minds of the jurors from the real issues in the case and procure a decision upon improper and irrelevant considerations. This court has great consideration for all the attorneys in this State who practice the profession of the law, and we are very much averse to criticising them and employing stinging language concerning them even when the record is full of evidence of their misconduct. We do not desire to repeat or detail any of the occurrences in the record relating to such conduct but will simply say that the entire complaint of counsel made in this case is sustained by the record. This court would be warranted in reversing the decree in this case on this objection, alone. Upon a consideration of the merits of the case, the evidence is in such a state that the decree rendered can not at any time be sustained if there is any substantial error in the record. In conclusion, as to this objection, we must make it plain that before this decree can be affirmed the record must be free from error and the conduct of counsel be such that no just complaint can be urged against it.

Counsel for appellee assign as cross-errors, and insist in the first place, that it was error to tax as costs against the estate a solicitor's fee for the guardian *ad litem* of

\$2000. The court appointing a guardian *ad litem* should see that no unnecessary or improper defense is interposed by him and that the interests of the infant are protected by such proper defense as he may have. In other words, it is the duty of the guardian *ad litem* to make only a proper defense and to incur no unnecessary expenses in making the same. Under our statute the guardian *ad litem* is entitled to a reasonable fee for making a reasonable and necessary defense, and it is proper in cases of this kind to tax such fee as costs or expenses against the estate. (*Baker v. Baker*, 202 Ill. 595; *Comstock v. Redmond*, 252 id. 522; *People v. Pasfield*, 284 id. 450.) Only a reasonable allowance should be made by the court, and such reasonable amount should be fixed by the testimony of attorneys as to what is a customary fee for the services performed in cases wherein the fee is the subject of contract between the solicitor and client. The fee in this case was not based on proper testimony of attorneys. The question ought not to be submitted to them as to what is a reasonable fee, merely, or as to what is the customary fee allowed in such cases, but the question for them to answer is what is the customary fee in such cases where the fee is the subject of contract between solicitor and client, and the court is supposed to know and understand himself what is such fee and is not absolutely bound by the testimony of attorneys, particularly where the same appears to him to be unreasonable.

There are other questions raised on this record that do not require a decision, as they may not occur or will be obviated on another trial. The record is not sufficient upon which to base a decision on some of the points. For instance, it is claimed by appellee that the codicil of June 15, 1916, (which was expressly confirmed as a part of the will of July 11, 1916, by the second codicil of November 18, 1916,) is properly a part of the will in case the codicil of November 18 is finally sustained, and that that codicil should have been produced by appellants. Appellants con-

tend that such codicil is not made an issue in this case by appellee's bill, and it is true that there is no reference to it in the bill. There is evidence in the record tending to show that it was lost, and it is contended, also, that there is a presumption that it may have been destroyed by the testatrix. It does not appear from the record whether or not this codicil was probated as a part of the will in question. Considering the fact that the testatrix was in the hospital on and after the time of the making of her second or last codicil, it would seem to be an easy matter to establish all the facts concerning the existence or destruction of this codicil by the testatrix and all other facts, if the codicil is to have any important bearing on this case.

For the reasons aforesaid the decree is reversed and the cause remanded.

Reversed and remanded.

(Nos. 14489-14490.—Judgment affirmed.)

JOHN A. MCGARRY *et al.* Appellants, *vs.* THE VILLAGE OF WILMETTE *et al.* Appellees.

Opinion filed April 19, 1922.

1. SPECIAL TAXATION—*city cannot re-levy tax under Sidewalk act where original ordinance was held void.* Section 8 of the Sidewalk act, as amended in 1907, does not give a city or village power to re-levy a special tax where the original ordinance has been held void as being beyond the authority of the municipality to enact. (*People v. Latham*, 203 Ill. 9, explained.)

2. WORDS AND PHRASES—the word “void,” in strict sense, means *without force or effect*. The word “void,” when used in regard to a proceeding, in its strict sense means that the proceeding is an absolute nullity and without any force or effect.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding.

GEORGE A. MASON, (HENRY E. MASON, of counsel,) for appellants.

WILKERSON, CASSELS, POTTER & GILBERT, and ALBERT C. WENBAN, (RALPH F. POTTER, and EARL D. HOSTETTER, of counsel,) for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court :

In each of these consolidated cases there was a petition for *mandamus* filed by appellants, John A. McGarry and Henry Fowler, doing business as John A. McGarry & Co., praying that a writ of *mandamus* be issued against the village of Wilmette and its trustees commanding them to take such steps as may be necessary to re-levy and collect a special tax. The petition for the writ was denied in each case in the circuit court, and on appeal to the Appellate Court the judgment order of the circuit court was affirmed, and the cases have been brought here on appeal on a certificate of importance granted by the Appellate Court. As the two cases involve the same principles of law and the same conclusion must be reached in each, the cases were consolidated in this court and will be disposed of in one opinion.

The petition for *mandamus* filed in the circuit court prayed that the village of Wilmette and its trustees be required to take the necessary steps to re-levy and collect a special tax for the unpaid portion of the special tax levied to pay the cost of constructing a system of cement sidewalks in the village in order to pay the balance due the petitioners under said contracts for the construction of the sidewalks. To the amended pleas filed by the village and its trustees a general demurrer was sustained in the trial court except as to the first plea. Upon the issues joined upon that plea the case was tried and judgment entered in the circuit court against the petitioners. As the case must be disposed of upon the issues raised by that plea it is unnecessary to consider the issues raised by the other pleas.

On the trial it was shown that the ordinance described in the petition was enacted by the president and board of trustees of the village of Wilmette in July, 1900; that this ordinance required the construction of concrete sidewalks along certain streets in Wilmette and that the cost thereof be paid by special taxes on the contiguous lots in proportion to their respective frontages on the walks, under the provisions of the Sidewalk act of 1875. The record also shows that the ordinance provided for the laying of more than forty separate and disconnected sidewalks, located on about twenty different and widely separated streets of the village; that a considerable portion of the sidewalks was laid by the property owners themselves, and that in September, 1900, a contract was made by the village authorities with appellants herein for the construction of the remainder of the walks; that the contract between appellants and the village authorities was based upon the ordinance, which provided that appellants should be paid in vouchers solely out of the special taxes when collected, and that appellants assumed all the risk of the invalidity of such special taxes levied; that subsequently, after the sidewalks had been constructed by appellants, certain property owners refused to pay the special tax assessed against their property, and that upon application in the county court of Cook county for a judgment of sale against these delinquent lands the objections of the owners were sustained and judgment refused. The judgment of the county court was thereafter appealed to this court and affirmed in *People v. Latham*, 203 Ill. 9.

It is contended by counsel for appellees that the Supreme Court in the *Latham case* affirmed the judgment solely, if not entirely, upon the ground that the ordinance as to the levying of the special tax for paying the installments was void, while counsel for appellants argue at length that the ordinance was not held void but simply defective and voidable, and furthermore argue that when the *Latham*

case was decided, in 1903, it was clear that under the Sidewalk act of 1875 there was no provision permitting the re-levying of an assessment that had been held defective or void by the courts, (*Weld v. People*, 149 Ill. 257,) but that since that time, in 1905, the Sidewalk act was amended so as to permit, under certain conditions, a new ordinance to be enacted for the purpose of paying for the sidewalks by special taxes already levied under a prior ordinance where the work was done in good faith; that the Sidewalk act was again amended in 1907, section 8 of the amended act providing that "if any special tax for the construction of a sidewalk shall have been [made] prior to the taking effect of this amendment or shall hereafter be annulled by the city council or board of trustees or set aside by any court, a new ordinance may be passed and a new tax may be made and returned and the proceedings therefor shall be the same as in the first instance. * * * No special tax shall be held void because levied for work already done under a prior ordinance, if it shall appear that such work was done in good faith, by the city, village or town, or under contract duly let and executed, pursuant to an ordinance providing that such sidewalk should be paid for by special tax." (1 Hurd's Stat. 1921, p. 430.) Counsel for appellees earnestly insist that under the decisions of this court this statute cannot give the power to the municipality to re-levy the tax when the original ordinance was held void. (*People v. Hayes*, 258 Ill. 243; *People v. Lawson*, 285 id. 382.) The decisive point in the case is, therefore, whether this court held the original ordinance absolutely void in deciding the *Latham case*.

The word "void" has been used so frequently by the courts without carefully distinguishing whether it was intended to mean absolutely void or merely voidable, (*Hewes v. Glos*, 170 Ill. 436; 29 Am. & Eng. Ency. of Law,—2d ed.—1065,) that the decisions and authorities must be examined with care in order to ascertain the meaning in

which the word was used by the court in the particular case decided. If the word is used in its strict sense, as being absolutely void, then it is held that it means that the proceeding is an absolute nullity—without any force or effect. (29 Am. & Eng. Ency. of Law,—2d ed.—1065; 40 Cyc. p. 214.) If the court in deciding the question holds that the court is without jurisdiction of the subject matter and the parties, (*Feaster v. Fleming*, 56 Ill. 457; *Sholty v. Dale Township*, 63 id. 209;) then, without question, the entire proceedings are void. This court in *People v. Grover*, 203 Ill. 24, and *People v. Stearns*, 213 id. 184, approved the reasoning and holding of this court in *People v. Latham*, *supra*; and in the *Stearns case* stated that the ordinance in the *Latham case* was held void. An examination of the opinion in the latter case shows clearly that the ordinance was not only held defective but absolutely void because the municipal authorities were without power to enact the ordinance providing for the letting of the various pieces of sidewalk in many different streets over widely separated portions within the village of Wilmette. It necessarily follows, in our judgment, that this court intended to hold that the original ordinance in the *Latham case* was absolutely void because the president and village trustees had no authority to pass the ordinance,—not that the court sustained the objections to the original ordinance merely because the ordinance was defective or that an error was made in the procedure in levying the assessment, but because the entire ordinance was beyond the authority of the village council to enact. This being so, the trial and Appellate Courts reached the correct conclusion in holding the ordinance void. This conclusion renders it unnecessary for us to discuss the other questions raised in the briefs.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(No. 14167.—Judgment reversed.)

THE CARTERVILLE AND BIG MUDDY COAL COMPANY, Plaintiff in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.*—
(MARY REICHERT, Admx. Defendant in Error.)

Opinion filed April 19, 1922.

WORKMEN'S COMPENSATION—*when amendment of 1919 allowing claim to be filed within eighteen months after return to work does not apply.* The amendment to the Compensation act in 1919 allowing a claim for compensation to be filed within eighteen months after the employee returns to work for the same employer does not apply to a case where the injury occurred more than six months before the amendment took effect and where no claim for compensation was filed within that time, no proceeding was pending and no payments were made, as the amended act could not revive a claim which was extinguished before the amendment took effect.

WRIT OF ERROR to the Circuit Court of Williamson county; the Hon. D. T. HARTWELL, Judge, presiding.

CHARLES C. MURRAH, for plaintiff in error.

A. W. KERR, and GEORGE R. STONE, for defendant in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

The claim in this case is for an alleged injury and sickness of Jacob Reichert, caused by working in bad air and being overcome thereby in plaintiff in error's mine. The arbitrator found for the claimant and the Industrial Commission confirmed the arbitrator's finding and award. On a hearing in the circuit court the finding of the commission was affirmed, and the case is brought here by writ of error for further review.

Numerous questions are raised in the briefs, among others whether or not Reichert's injury arose out of and in the course of his employment by the plaintiff in error,

whether or not plaintiff in error had notice under the statute, and whether or not the Workmen's Compensation act is constitutional. In view of our finding on another point in the case we do not think it will be necessary to pass on any of those questions.

It appears from the record that the injury is alleged to have taken place March 13, 1918; that the claimant, Reichert, was home three or four days and then returned to work in plaintiff in error's mine and worked three or four days, so that his return was somewhere between the middle and last of March, 1918. The application for compensation was filed August 22, 1919, which was within eighteen months after Reichert returned to work. The amended law of 1919 went into force July 1, 1919,—which was at least fifteen months after Reichert's return to work,—extending the time for filing the claim to eighteen months. The law applicable to the case when the accident happened was the law of 1917, and under that act claim for compensation must be made within six months, and hence at the expiration of that time, (no payment having been made under the provisions of the act,) unless there was a pending proceeding the right to proceed thereafter for the claim must be held to be extinguished. (*Ohio Oil Co. v. Industrial Com.* 293 Ill. 461.) The law of 1919 could not be retroactive, under that decision, to revive a substantive right to the applicant's claim. If there had been a pending proceeding the situation would have been different, because then it might, perhaps, have been argued, as counsel for defendant in error seem to argue, that the law was simply a change in the procedure and would apply to pending litigation; but a new or amended act could not apply to revive a claim which had been wholly extinguished prior to its enactment, according to the law existing at the time of the new enactment, hence the applicant did not have the right to bring this action more than six months after the time of the alleged accident. *Ohio Oil Co. v. Industrial Com. supra.*

As the arbitrator and the Industrial Commission were without jurisdiction to hear and pass upon the claim, the judgment of the circuit court must be reversed and the record of the Industrial Commission quashed.

Judgment reversed.

(No. 14360.—Decree affirmed.)

JOHN S. ABBOTT *et al.* Defendants in Error, *vs.* WILLIAM E. LOVING *et al.* Plaintiffs in Error.

Opinion filed April 19, 1922—Rehearing denied June 7, 1922.

1. PLEADING—*when a bill is not multifarious.* Where the causes set forth in a bill may more conveniently be tried in a single suit, so that a multiplicity of suits will be avoided, and where the relief sought in each cause is of the same general character and no unreasonable hardship will be caused the defendants, the bill is not multifarious.

2. CORPORATIONS—*when bill to set aside organization of corporation for fraud is not multifarious.* A bill filed by subscribers to the capital stock of a corporation to set aside the organization on the ground of fraud is not multifarious because it prays for the setting aside of certain deeds conveying property to one of the defendants as trustee for the corporation, that the subscription of the complainants be considered null and void, and that the charter of the company be set aside, where all the instruments against which the relief is prayed are the result of a common scheme to defraud the complainants.

3. SAME—*fraudulent issue of unpaid stock as fully paid up is cause for forfeiture.* The issuing of stock by a corporation fraudulently as fully paid up, when, in fact, it is not actually paid, renders the charter of the corporation liable to forfeiture at the instance of the State.

4. SAME—*court of equity has statutory power to dissolve corporation because of fraud in organization—receivers.* Under section 54 of the general Corporation act of 1919 a corporation may be dissolved by a bill in chancery filed by stockholders or subscribers for stock on the ground of fraud in the organization of the corporation, and where there is no indebtedness to third parties which is not involved in the fraud connected with the company's organization the decree for dissolution will not be reversed merely because it does not provide for a receiver.

THOMPSON, C. J., dissenting.

WRIT OF ERROR to the Circuit Court of Crawford county; the Hon. JULIUS C. KERN, Judge, presiding.

DONOVAN D. McCARTY, and JONES & LEVIN, for plaintiffs in error.

BRADBURY, GAINES & BRADBURY, and A. L. LOWE, for defendants in error.

Mr. JUSTICE CARTER delivered the opinion of the court :

This was a proceeding in which an original bill in chancery was filed in November, 1920, and later an amended bill was filed by defendants in error in the circuit court of Crawford county concerning the organization and conduct of a poultry, feeding and produce business under the corporate name of the Crawford Produce Company, in and about the city of Robinson, in said county. On a hearing in the circuit court it was found there was fraud in the organization of the produce company, and a decree was entered that certain deeds conveying property to plaintiff in error William E. Loving as trustee should be set aside and that a subscription paper obtained by Loving for shares of stock be considered null and void, and also that the organization of the produce company, and its charter, should be set aside because of fraud in the organization. A writ of error has been sued out to review that decree.

According to the allegations of the amended bill, which the evidence in the record tends to support, it appears that plaintiff in error William E. Loving undertook to interest people in Crawford county, particularly in Robinson, in the organization of a produce company to be located in that city, to engage in the poultry business and for the building and carrying on of a modern poultry, feeding and produce plant therein; that after talking with several people interested in the project he invited them to visit Olney, where

he had a plant located, to examine the workings of that plant and to satisfy themselves that the plan of such a plant in Robinson was practical and advantageous; that certain of those who afterwards subscribed to the project went with him to visit the plant at Olney, and as the result of this visit Loving was invited by the Chamber of Commerce of Robinson to present his views on the subject before its members, and he appeared before the organization and presented his plans in a rough outline, which appear to have been favorably received by his hearers. He then undertook to obtain stock subscriptions from the citizens of Robinson and the adjoining portions of Crawford county, with the understanding that a corporation was to be organized with a capital stock of \$60,000, \$30,000 of which was to be subscribed by the citizens of Robinson and vicinity and \$30,000 to be furnished by Loving and his father, A. R. Loving. The weight of the evidence in the record, in our judgment, tends to support the allegations of the bill that it was understood when the stock subscriptions were taken by Loving that after the stock was subscribed the corporation was to be organized with a board of directors whose names were specified, four of whom were well known business or professional men of the county and the fifth member to be the elder Loving. The subscription paper which was circulated by Loving provided for 1000 shares of preferred stock at \$100 per share and 1000 shares of common stock at no par value but to be sold at \$5 per share, and that each subscriber was to receive half a share of the common stock for each \$100 share of preferred stock. After a certain number of subscribers were obtained a charter was issued by the Secretary of State upon Loving filing the usual statement showing that all the stock had been subscribed, and in this statement A. R. Loving, Iley Smith, Athas Greeson, R. R. Erving and G. C. Barker were named as directors, and these names were given in

the statement attached to the charter issued by the Secretary of State. All of the five named persons were friends or relatives of Loving and in no way selected by or satisfactory to the subscribers to the stock but were selected by Loving as being friendly to himself. The signers of the statement sent to the Secretary of State, upon which the charter was issued, were William E. Loving, Athas Greeson, his brother-in-law, and Robert R. Erving, of Chicago. It is insisted by counsel for plaintiffs in error that these men were named on a "statement of incorporation" that was referred to in the stock subscription paper as attached thereto, but the testimony of a number of witnesses on the part of defendants in error is to the effect that no such statement with the directors' names on it was attached to the subscription paper, and the persons who were, in fact, named as the first board of directors in the statement sent to the Secretary of State were not, except A. R. Loving, referred to as the proposed directors at the time the subscription paper was signed. It also appears that about the time they applied for the charter Loving procured a deed from the Robinson Ice and Milling Company to himself, as trustee for the Crawford Produce Company, conveying the real estate and assets of the ice company for the expressed consideration of \$24,200, to be paid in capital stock of the proposed corporation to the stockholders of the ice company in proportion to their respective shares. Said deed was afterwards recorded in the recorder's office of Crawford county. The bill also alleges that Loving secured other deeds to the real estate for the proposed site of the corporation from Edward E. Lindsay and wife, D. A. Mefford and wife, F. W. Lewis and wife, and others, to be paid for in capital stock of the proposed corporation, and that after the selection of the first board of directors, because of this transaction with the ice company, it was decided to increase the capital stock for which the Crawford Produce Company was incorporated from \$60,000 to \$100,000.

The bill further alleges that William E. Loving caused the persons designated as directors of the produce company, after their selection, to hold a meeting with intent to cheat and defraud defendants in error, and said board passed a resolution to take over the property and assets of the ice company at \$24,200, the poultry and egg business of A. R. Loving & Co., located at Robinson and Greenup, at a valuation of \$14,700, and other property for the poultry and egg business at \$2760, all of said property to be paid for in stock of the Crawford Produce Company corporation; that Loving subscribed for himself and A. R. Loving, jointly, 530 shares of the common stock and 115 shares of the preferred stock of the Crawford Produce Company, which was represented in the statement of the incorporation filed with the Secretary of State to have been fully paid but which was not, in fact, fully paid, and thereupon, after procuring the approval of the directors of the company, Loving, as trustee, executed deeds conveying to the Crawford Produce Company the property of the ice company and the poultry and egg business of A. R. Loving & Co. and certain real estate purchased by the trustee, which deeds were filed for record in the recorder's office of Crawford county. The allegations of the amended bill, which the proof tends to support, were to the effect that A. R. Loving & Co.'s property which was turned over to the produce company for \$14,700 was worth not to exceed \$1500, and that the statement prepared by Loving and presented to the Secretary of State that at least half of the stock of the Crawford Produce Company had been paid for by the subscribers was untrue, and that the Secretary of State was misled in granting the charter because of these false and fraudulent statements. The bill further alleges that Loving, without the approval of defendants in error, caused the board of directors selected by him to issue stock certificates in which the common stock was wrongfully and fraudulently placed on a parity with the preferred stock,

and fraudulently and corruptly caused to be issued and delivered stock to other named persons, who, if they paid for the stock so issued to them, paid the money to Loving and it was not accounted for by him; that after Loving had induced the first board of directors to ratify and approve his acts with reference to the purchase of the property of the ice company and the stock of the poultry and egg business of A. R. Loving & Co. he procured the resignation of two of the members of the first board of directors and the selection of two of defendants in error, without their consent, to act as directors, and that the original board of directors had before this time elected defendant in error John S. Abbott, without his consent, as treasurer of the Crawford Produce Company, and that certain moneys paid by the subscribers on the capital stock were turned over to Abbott by Loving, which sums he is holding subject to disposition by order of the court. The prayer of the bill was that various transactions carried on by William E. Loving and the board of directors, as recommended by him, including those with reference to the ice company and the purchase of A. R. Loving & Co.'s poultry and egg business, should be canceled and set aside.

The bill was demurred to, generally and specially, by William E. and A. R. Loving, and also by the other members of the first board of directors, who were made parties defendant. On a hearing the general and special demurrer of the plaintiffs in error was overruled. The Secretary of State, who was made a party defendant, did not demur but answered, admitting the issuance of the charter to the Crawford Produce Company and denying that the charter was illegal and void, apparently on the ground that the statement filed with him appeared to be regular and legal and in compliance with the statute. A. R. Loving answered, denying any fraudulent design on the part of William E. Loving or himself or the other parties in securing the deeds from the ice company and the other deeds to William E.

Loving as trustee for the Crawford Produce Company, and insisting that the egg and poultry plants in which he was interested in Greenup and Robinson were not turned over at a fictitious value; denying any fraud on the part of the directors of the Crawford Produce Company, or any of them, with reference to obtaining the charter from the Secretary of State and the selection and naming of the first board of directors; denying that any fraudulent representations were made at the incorporation of the company as to the paid-up subscriptions, in the report to the Secretary of State, and further representing that the business of the Crawford Produce Company would have been a success if it had been properly supported by the subscribers to its capital stock. William E. Loving stood by his demurrer to the amended bill and did not appear in person on the trial of the case in the circuit court or testify or offer any evidence on his own behalf on that hearing. The testimony of several of the subscribers was to the effect that Loving promised them that he and his father would put in \$30,000 cash, as we understand the record, in the stock of the proposed corporation; that Loving was asked to put such statement in writing, and thereafter came back with a letter stating that he would put in \$25,000 or \$30,000, but this letter was not produced in evidence, and it is claimed by counsel for plaintiffs in error that no such letter was ever written.

John S. Abbott, one of the defendants in error, is president of the Crawford State Bank at Robinson and also president of the Chamber of Commerce in that city, and seems to have been financially interested in the ice company before its purchase by the board of directors of the Crawford Produce Company. He testified that he talked with William E. Loving about selling the business of the ice plant and increasing the capital stock of the produce company, and told Loving if the ice plant were taken over and the capital stock increased he would take 50 shares of the preferred stock and 25 shares of the common stock, with the under-

standing that local men chosen from a designated list should manage the business; that his understanding with Loving was that after the stock subscriptions were obtained there was to be a meeting of the stockholders who had signed the subscription list, to elect a board of directors and talk over the policy of the new company. Certain other witnesses testified substantially the same as Abbott as to the method agreed upon for choosing the directors. The testimony also tended to show that some of the cash paid by the subscribers had been turned over by Loving to Abbott but no subscribers' meeting had been called. Abbott also stated that he told Loving that he was attempting to unload the poultry and egg business at Greenup and Robinson, which was run in the name of A. R. Loving & Co., at a fictitious value of \$14,700; that during a conversation with A. R. Loving the latter admitted that the plant at Greenup was only worth about \$1600 and the one at Robinson about \$500, and that then Abbott told the elder Loving that restitution would have to be made as to this transaction before he would act as director of the Crawford Produce Company. The weight of the evidence in the record on the hearing tends strongly to show that the poultry and egg business at Greenup and Robinson was not worth to exceed \$1500 or \$1600.

The main contention of counsel for plaintiffs in error is, not that the property that was taken over by the board of directors of the new produce company was not overvalued, but that for various reasons the court was without authority in this proceeding to grant the relief asked for by the amended bill. Among the objections of plaintiffs in error on this point,—possibly the one most relied on,—is, that the bill as drawn is multifarious, and that therefore the demurrer thereto should have been sustained by the trial court. This court has discussed in several cases whether or not a demurrer to a bill in chancery should be sustained on the ground that the bill was multifarious, as here drawn,

and the court has said that it is impossible to lay down any rule universally applicable and controlling on this question or to say with certainty what constitutes multifariousness as an abstract proposition, under the authorities; that there is no settled and inflexible rule; that the modern tendency of the courts is to relax the rigid rules of pleading and to hold that a bill is not multifarious where causes set forth in the bill may more conveniently be tried in a single suit, where it will avoid a multiplicity of suits, and where the relief sought in each cause is of the same general character and no unreasonable hardship will be caused the parties against whom the relief is asked. It was held that a bill under such circumstances is not multifarious. (*Anderson v. Anderson*, 293 Ill. 565; *First Nat. Bank v. Starkey*, 268 id. 22.) "A bill is not necessarily rendered multifarious by reason of the fact that there may be united in it several causes of action. If all the different causes of action united in the bill grow out of the same transaction, and if all the defendants are interested in the same rights and the relief against each is of the same general character, the bill may be maintained. No bill is multifarious that presents a common point of litigation, the decision of which will affect the whole subject matter and will settle the rights of all the parties to the suit." (10 R. C. L. 430; see, also, on this point, 20 Stand. Ency. of Procedure, 62.) In discussing this question this court said in *North American Ins. Co. v. Yates*, 214 Ill. 272: "The essence of the charge is the common scheme among the individual defendants and others, and the officers in control of the insurance companies, to violate and disregard the insurance laws of the State and to defraud persons obtaining policies from them. * * * The relief asked against all is the same and the acts complained of are all part of the common plan, and we are of the opinion that the bill is not multifarious." It is obvious, under the allegations of the amended bill in this case and the proof heard at the trial

in the circuit court, that the plaintiffs in error were engaged in a common scheme in attempting to defraud defendants in error, and the argument that the bill is multifarious, under the authorities, must be held to be without merit.

Counsel for plaintiffs in error also urge that the allegations of the bill are not of the character to give a court of chancery authority to interfere in the matter. With this contention we do not agree. In *Wampler v. Wampler*, 30 Gratt. 454, the court said (p. 459): "Courts of equity have an original, independent and inherent jurisdiction to relieve against every species of fraud, * * * but none of such devices or instruments will be permitted by a court of equity to obstruct the requisition of justice. If a case of fraud be established a court of equity will set aside all transactions founded upon it, by whatever machinery they may have been effected and notwithstanding any contrivance by which it may have been attempted to protect them." This doctrine is quoted with approval in Pomeroy's Equity Jurisprudence. (Vol. 2, 3d ed. sec. 914.) That learned author states that in administering remedies, pecuniary as well as equitable, "the fundamental theory upon which equity acts is that of restoration,—of restoring the defrauded party primarily, and the fraudulent party as a necessary incident, to the positions which they occupied before the fraud was committed. Assuming that the transaction ought not to have taken place, the court proceeds as though it has not taken place and returns the parties to that situation." (Ibid. sec. 910.) The proof in the record, with the allegations of the bill, tends to show that William E. Loving attempted and intended to perpetrate a fraud upon the stockholders of the proposed corporation,—not so much, perhaps, by mis-statements directly inserted in the subscription paper for obtaining stockholders, but because he represented to the subscribers for the stock that the names of the directors, other than his father, would be chosen from among certain designated persons recom-

mended by the subscribers and in whom they apparently had much confidence, and that the local directors represented by such subscribers of the stock would control the management, but notwithstanding such representations the directors actually selected were special friends or relatives of Loving who had not been mentioned to the subscribers and who proceeded to take over the Loving property at a greatly inflated value. There are other acts indicating bad faith shown in the record. From the record it does not appear that the subscription lists themselves, signed by the subscribers to the stock, had attached to them a copy of the statement giving the names of those who were to be selected as directors when the company was organized, although the lists stated that such a statement was attached; but there is evidence in the record showing that Loving, when the fact of such statement not being attached to the subscription lists was mentioned, said that they could attach the paper later, when the subscribers had selected the directors. It would appear from the record that when he had secured the necessary subscriptions by means of representing that good business men, bankers, etc.,—trusted men in Robinson and vicinity,—were to be selected as directors, instead of advising with the stockholders with reference to the list of directors to be chosen he placed in the statement sent to the Secretary of State the names of directors chosen by himself, including his father, his brother-in-law, one Chicago friend and two other men, none of whom were recommended or suggested by the stockholders of the proposed corporation, and that this board, apparently recommended by Loving alone, was under the provisions of the present Corporation act named by the Secretary of State in the copy of the statement attached to the charter when it was issued, as the directors of the company. It would also appear from the record that after the charter was granted by the Secretary of State these men named as directors met and organized, apparently at the suggestion of

Loving, and took over at a fictitious value the two small poultry and egg enterprises formerly owned by A. R. Loving & Co., so that the partnership was to receive several times what the business was worth if the transaction was carried out as agreed to by the directors of the Crawford Produce Company. The allegations of the bill are also to the effect that Loving accepted several thousand dollars' worth of subscriptions himself, and procured the "dummy board," as defendants in error and their attorneys call it, to issue stock for these subscribers, and the evidence tends to show that a certain portion of this money thus obtained for these subscriptions was kept by Loving and not turned over to Abbott, the temporary treasurer of the new corporation.

The courts have held very similar transactions as to obtaining subscriptions and organizing a corporation such fraud that courts of equity would interfere. In *Terwilliger v. Great Western Telegraph Co.* 59 Ill. 249, where a number of persons organized a telegraph company and one of the number subscribed for nearly all of the stock and transferred it to another person to hold as trustee and to represent and sell the same but no money was to be paid for said stock by those organizing the company, and such subscriber, by contract with the company, undertook to build two thousand miles of line with the agreed price largely above the cost of construction, it was held that equity would interfere to prevent the carrying out of such an agreement and compel the corporation to set aside its fraudulent transactions.

In the recent case of *Tevander v. Ruysdael*, 253 Fed. 918, the Federal court of appeals for the northern district of Illinois sustained a bill in chancery to set aside for fraud the transactions of one of the promoters of the organization for taking over the business of a partnership. The bill in that case practically asked for the same relief as to the organization of the corporation, the conduct of its business and the setting aside of the transactions that led to its in-

corporation as is asked for in this bill, and the opinion, in discussing the right of the court of equity to interfere with the acts of the corporation as thus organized, said (p. 923): "If appellee was induced to enter the agreement to dissolve the partnership and create the corporation through the fraudulent representations of Tevander, will a court of equity permit the latter to escape liability by hiding behind the fictitious third party, the corporation, the stock of which he and appellee are the sole owners? The assets of the co-partnership were turned over to this corporation by reason of the action of the co-partners, which action was induced by the fraudulent representations of appellant, Tevander. This fact being shown, the right of the corporation to the assets of the co-partnership is subject to be defeated upon proof that fraud was practiced upon the co-partnership. In other words, the title of the corporation to the assets here involved rests upon an assignment from the co-partnership. Contemporaneously executed and indorsed on the back of the assignment is an agreement to dissolve the co-partnership. Both assignment and agreement to dissolve in turn rest upon the written agreement of Tevander and appellee (*a*) to dissolve the co-partnership, (*b*) organize the corporation, and (*c*) assign to the latter the assets of the former. If fraud tainted the last-named agreement its consequences reach all three transactions. Even though the corporation may not be dissolved, no good reason is advanced why it should hold property under an assignment secured through fraud." See, also, somewhat similar reasoning in *Barcus v. Gates*, 89 Fed. 783.

Without question, under the allegations of the bill and the evidence in the record, the subscriptions to stock in the Crawford Produce Company by some, if not all, of defendants in error were obtained by Loving through fraudulent representations, and there can be no question, also, that the transactions as to the purchase of the egg and poultry busi-

ness of the Lovings by the dummy board of directors must be held fraudulent.

Counsel for plaintiffs in error do not appear seriously to contend that the allegations in the bill and the proof do not show that fraud was committed in certain respects in obtaining subscriptions for the stock and in the election of the stockholders and the transactions that were performed by the dummy board, but they contend very forcibly that such a question cannot be raised by a bill in chancery, and that a corporation, after it has been organized and a charter granted by the proper officials of the State, cannot be dissolved by a bill in chancery. It is the settled law of this State that courts of chancery have no jurisdiction, in the absence of statutory authority, to decree a dissolution of a corporation or decree a forfeiture of its franchise; (*Wheeler v. Pullman Iron and Steel Co.* 143 Ill. 197; *People v. Weigley*, 155 id. 491;) but this court has also held that such jurisdiction may be conferred upon chancery courts by statute. (*Chicago Life Indemnity Ass'n v. Hunt*, 127 Ill. 257; *Hunt v. LeGrand Roller Skating Rink Co.* 143 id. 118.) "Where a corporation does an act which its charter does not authorize it to do or which its charter or a statute expressly prohibits it from doing, such an act may, under certain circumstances, subject the corporation to the penalty of a dissolution." (*Bixler v. Summerfield*, 195 Ill. 147.) Section 25 of the Corporation act, before the act was amended in 1919, provided that "courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor who shall have authority, by the name of the receiver of such corporation, * * * to sue in all courts and do all things necessary to closing up its affairs, as commanded by the decree of such court." (Hurd's Stat. 1917, p. 703.) And this court in *Wheeler v. Pullman Iron and Steel Co.* *supra*, in discussing this section of the statute as to good cause, said (p. 207):

"We are of opinion that it is only 'as a portion of the relief provided for by that section' that the power to dissolve the corporation can be invoked. Moreover, 'good cause' for dissolving the corporation would necessarily be a legal cause,—a cause for which the sovereign authority might by law resume the franchise granted. It cannot be presumed that the legislature intended, by the use of the language here employed, to authorize a decree forfeiting the corporate franchise for causes for which the State might not procure judgment of forfeiture at law." The doctrine of this court in that case on this point is referred to with approval in *Bixler v. Summerfield*, *supra*. Obviously, whether the Crawford Produce Company was organized under the Corporation law or not, and whether it was a *de facto* or a *de jure* corporation, the allegations of the bill and the proof in the record as to fraud perpetrated by the so-called dummy board of directors, and as to the mis-statements in the statement sent to the Secretary of State, show a state of facts so fraudulent that the State by direct proceedings would have been justified and authorized to forfeit the charter by *quo warranto* proceedings. The issuing of stock by a corporation fraudulently as fully paid up, when, in fact, it is not actually paid, renders the charter of such corporation liable to forfeiture at the instance of the State. (1 Cook on Corporations, p. 125.)

It would seem clear under the reasoning of this court in *Wheeler v. Pullman Iron and Steel Co.* *supra*, and the other authorities cited, that the acts of the first board of directors of the Crawford Produce Company were of such nature as to justify the forfeiture of its charter by the State under section 54 of the new Corporation act, (1 Hurd's Stat. 1921, p. 803,) which last section is worded substantially as was section 25 of the Corporation act in force prior thereto, and therefore, under the decisions of this court heretofore cited, these acts justified the appointment of a receiver and the dissolution of the corporation by a

bill in equity under section 54. Properly understood, nothing has been said to the contrary in any of the decisions cited and relied on by counsel for plaintiffs in error, such as *Coquard v. National Linseed Oil Co.* 171 Ill. 480, *Lincoln Park Chapter R. A. M. v. Swatek*, 204 id. 228, and *American Trust Co. v. Minnesota and Northwestern Railroad Co.* 157 id. 641. In all of the decisions relied on by counsel for plaintiffs in error to sustain their position that it is only by direct proceedings that the corporation can be dissolved, it is manifest that the court did not intend to say that corporations could not be dissolved by a bill in chancery if the allegations and proof justified their dissolution under the provisions of former section 25 as construed by this court. This court said in *Coquard v. National Linseed Oil Co. supra*, on page 485: "Courts of chancery have no general power to appoint receivers of corporations and can only appoint them where expressly authorized by the statute. In the absence of statutory authority they have no jurisdiction to decree the dissolution of a corporation by decreeing a forfeiture of its franchise. (*Wheeler v. Pullman Iron and Steel Co.* 143 Ill. 197; *Chicago Steel Works v. Illinois Steel Co.* 153 id. 9; *People v. Weigley*, 155 id. 491.) The whole power of a court of equity in such cases is derived from section 25, chapter 32, of the Revised Statutes. Complainant did not bring himself within any provision of that section and is not entitled to the appointment of a receiver or dissolution of the corporation."

Defendants in error did not pray for the appointment of a receiver under the provisions of section 54 of the present Corporation act, which is similar to the provisions of former section 25 of the act as to the appointment of a receiver, to do all things necessary to closing up the business of the corporation. In view of the condition of the affairs of the corporation as shown by this record, under the allegations of the bill and the proof the circuit court was justified in entering the decree declaring void the various

deeds referred to in the amended bill and passed upon by the decree, and also in declaring void the subscriptions of defendants in error for stock, and as there does not seem to be anything in the record that indicates that there was any indebtedness of the corporation, after it was chartered, to third parties not involved in the fraud connected with the company's organization, it does not seem necessary at this stage of the proceedings to require that the decree be reversed for the appointment of a receiver. While, doubtless, it would have been the better practice to have prayed for the appointment of a receiver and not to have taken final action as to the distribution of the assets of the corporation and final dissolution of the same until after a report from the receiver, we cannot see that any injustice has been done to any of the parties, whether plaintiffs in error or defendants in error, by entering the decree herein questioned, setting aside the fraudulent acts of plaintiffs in error and decreeing the final dissolution of the corporation without the appointment of a receiver. The allegations of the bill and the evidence found in the record justified the various provisions of the decree.

Some other questions are raised with reference to the pleadings and certain other issues which counsel for plaintiffs in error assert are involved in this record, but as the questions that we have passed upon settle the real merits of the controversy we do not deem it necessary to discuss or pass on the other questions raised in the briefs.

In view of what has already been said, the decree of the circuit court is correct and should be and is affirmed.

Decree affirmed.

MR. CHIEF JUSTICE THOMPSON, dissenting.

(No. 14401.—Reversed and remanded.)

JOSEPH T. RYERSON & SON, Appellant, *vs.* THOMAS J.
PEDEN *et al.* Appellees.

Opinion filed April 19, 1922—Rehearing denied June 7, 1922.

1. CORPORATIONS—*stockholders are liable if property taken for subscription for the capital stock is over-valued—burden of proof.* Payment for capital stock with property is payment only to the extent of the true value of the property, and if the property of an old corporation is turned in for the capital stock of the new one at an over-valuation, the stockholders, if the corporation fails in business, are liable to make up the deficiency, and the burden is on them to show that such property equaled the value of the capital stock.

2. SAME—*decisions of State court are controlling in construing Corporation act.* The decisions of the State rather than Federal courts are controlling in the construction of the Corporation act as to the rights of creditors as against stockholders of a corporation.

3. SAME—*liability of stockholders for over-valuation of property may be enforced directly by creditors—bankruptcy.* Where a corporation is re-organized into a new company, the property of the old company being turned over to the new in full payment of the subscriptions to the capital stock in the new company, the liability of the stockholders because of the over-valuation of said property may be enforced directly by creditors after the failure of the corporation, and the right to enforce such liability is not an asset of the corporation to be turned over to the trustee in bankruptcy. (*Lane v. Nickerson*, 99 Ill. 284, distinguished.)

APPEAL from the Second Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. DENIS E. SULIVAN, Judge, presiding.

ERIC WINTERS, for appellant.

R. C. MERRICK, for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

Appellant, Joseph T. Ryerson & Son, a creditor of the South Chicago Architectural Iron Works, thereafter re-organized as the Illinois Architectural Iron Works, filed its

second amended bill in equity in May, 1919, against said company and all its stockholders, charging that the company ceased doing business leaving debts unpaid; that the stockholders of the company, while acting as directors, had accepted from themselves property in full payment of their subscriptions for stock which was of far less value than the par value of the stock for which they had subscribed, and therefore, under the provisions of the Illinois Corporation act, the company and stockholders were liable. All of the defendants to the bill answered, admitting the indebtedness of the company to appellant but averring that they were not guilty of any fraud in incurring the same; averring that the property turned over by the subscribers in payment for their stock was of the full value of the stock for which it was turned over; that in May, 1913, the company was adjudged a bankrupt and a trustee was appointed and the estate was fully administered and distributed by him among its creditors, and that any right of action against the stockholders on account of any alleged over-valuation of the property given in payment of subscriptions to stock passed to and was vested in the trustee in bankruptcy. The cause was referred to a master in chancery, who reported recommending that the bill be dismissed for want of equity. Objections filed to the report were overruled and filed as exceptions in the superior court. These exceptions were overruled and a decree entered September 26, 1919, dismissing the bill of complaint for want of equity, at complainant's costs. On appeal to the Appellate Court the decree of the superior court was affirmed and a certificate of importance granted by that court, upon which this appeal was brought to this court.

The evidence shows that the South Chicago Architectural Iron Works was organized to engage in the business of manufacturing and dealing in architectural ironwork, with a capital stock of \$10,000, fully paid up, which was later increased to \$25,000, and was held by six different

persons and fully paid. It appears further that it was decided to increase the capital stock, and a new corporation was formed called the Illinois Architectural Iron Works, with a capital stock of \$50,000, having the same persons as stockholders. When the new company was incorporated it appears that the former company, in March, 1912, turned over all its property to the new company in payment of the capital stock subscribed for by the stockholders in the first company in the Illinois Architectural Iron Works; that the company just organized took over the property, but with the obligation that it would "assume and pay all outstanding obligations of every kind" of the former company. In obtaining its charter no mention was made by the new company of the fact that it was to "assume and pay all outstanding obligations" of the old company, and it was recited in the charter of the new company that there was none of the \$50,000 capital stock that was not paid in full.

It is contended on the one hand that the testimony found in the record shows that there was an over-valuation placed upon the property and assets of the South Chicago Architectural Iron Works, which has resulted in a fraud upon the creditors and makes the stockholders liable under the provisions of the Corporation act. On the other hand, it is argued that there is nothing shown in the testimony to indicate that the stock was not fully paid for or that there was any dishonest attempt to over-estimate the assets, and that nothing is shown which tends to prove fraud. The same stockholders, directors and officials owned and controlled the original company that owned and controlled the new company. The Illinois Architectural Iron Works was organized with a larger capital stock to conduct the same business theretofore operated, and the stock was taken by the stockholders of the new company in about the same proportion as they held in the old company, except that 125 shares were not paid for in cash, which stock was called treasury stock and taken by the treasurer as trustee,

for the use of all the subscribers. The reported assets at the formation of the new company were as follows: Real estate, \$22,000; machinery and tools, \$9500; stock of metals, manufactured iron and other merchandise, \$8500; contracts for work and materials, net value, \$5000; bills and accounts receivable, net value, \$2500; good will and trade name of business, \$2500; total, \$50,000. It also appears that the South Chicago Architectural Iron Works showed an indebtedness at the time of the transfer of about \$12,500, which amount was not taken into account nor reported in the report of the new company to the Secretary of State.

About three months before the re-organization of the business a trial balance was made by the old company, showing the value of real estate to be \$9147.43; machinery, about \$8000; accounts receivable, about \$3000; stock on hand at cost; and the entire assets about \$27,000. The testimony of the secretary and treasurer of the old company was to the effect that at the time of re-organizing and increasing the capital stock it was found that the old company was worth, after deducting liabilities, about \$37,500 and its gross assets were about \$50,000. It would appear, also, that shortly after the new company was organized, in May, 1912, profit and loss of the new company was credited with \$12,500, which was charged to the treasury stock, and the treasurer testified that \$11,400 in the treasury prior to that time brought the total of treasury stock up to \$23,900. On the last day of May, 1912, an audit was made from the beginning of the business to that date, which would presumably not be greatly different from the condition at the time of the new organization. The testimony of some of the witnesses was to the effect that they thought the new company was prospering up to about the time it went into bankruptcy, appellant apparently being one of its largest creditors. Appellant began in September, 1912, to do business with the organized company and continued to do business with the new company up to the time of the failure. Ap-

pellant's credit man, L. H. Jackson, called the attention of some of the officers of the new company to notes due or coming due, owed by that company, and a conference was held at Jackson's office to see what could be done. An arrangement was made which it was hoped would tide the new company over its difficulties, but these arrangements failed to accomplish the purpose, and in May, 1913, the company went into bankruptcy. Considerable testimony was taken, several witnesses being sworn by both parties, as to whether the assets of the South Chicago Architectural Iron Works turned over to the new company were credited at their fair face value or in excess thereof, in favor of the stockholders of the new company, as paying for their stock in that company. From the evidence in the record we think it was rightly held by the Appellate Court that the property so turned over to the new company did not equal in value the par value of the stock in the new company, which was considered as paid for thereby.

It is manifest that the old company, before the incorporation of the new company, was not entitled to the payment of \$2500 for its good will, as it is clear that it had not made money, and this court said in *Dee Co. v. Proviso Co.* 290 Ill. 252, that if a going concern has made no money no one would pay any more for it because it was going. The court also held in that case that property may be taken in payment for stock, but it must be done by a valid contract of bargain and sale. Payment for capital stock with property is no payment except to the extent of the true value of the property, and if the property is taken at an over-valuation the stockholders are liable to make up the deficiency; and when a failure occurs in the business, the law puts upon the persons who disposed of the assets of a former company to pay for the capital stock of the new company the burden of showing that the property so turned over equaled the value of the capital stock for which it was considered to be paid. The evidence in the record, in

our judgment, shows that the difference between the real value of the property turned over to the new company for new stock and the par value of that stock was more than the amount of appellant's claim.

In April, 1913, a petition was filed in the United States district court to have the Illinois Architectural Iron Works adjudged a bankrupt. Daniel P. Trude was elected trustee. Appellant filed a claim of \$7222.44 against the estate. It was allowed and afterwards two dividends were paid thereon, one of 20 per cent and one of 13½ per cent, aggregating, by the claim of appellant, \$2419.52. Nothing further has been paid. In April, 1913, the company ceased doing business, and after the above dividends were declared the trustee reported that the assets of the company were exhausted. The trustee made no attempt to collect any stock liability from the stockholders, and did not include in his report any claim based on the fact that the property turned over by the South Chicago Architectural Iron Works was insufficient to pay the full value of the stock in the new company issued to appellees. The master found that the defendant stockholders became liable to the creditors of the new company for the unpaid balance of their stock, amounting to \$25,000, but also found that the right to recover for the unpaid balance vested in the trustee in bankruptcy, and that appellant had no right to recover for the same except through the trustee. The recommendations of the master were, in effect, sustained by the superior court in this regard by the decree entered in this case and also by the holding of the Appellate Court. This leaves the most serious question in the case to be considered,—that is, the correctness of the rulings of the trial and Appellate Courts, to the effect that the exclusive remedy to recover on account of over-valuation of the property turned over in the payment of stock vested alone in the trustee in bankruptcy, or whether the creditors of the bankrupt company had a right themselves to recover the difference between the real value of

the assets turned over and the amount at which the assets were valued in paying for the stock issued to appellees.

Section 47*a* of the National Bankruptcy act, as amended in 1910, in part reads as follows: "And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied." (9 U. S. Comp. Stat. Ann. 1916, p. 11458.) Section 70 of the same act, as revised in 1910, reads: "The trustee of the estate of a bankrupt * * * shall * * * be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, * * * to all * * * (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. * * * The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication." (9 U. S. Comp. Stat. Ann. 1916, p. 11719.)

The question whether appellant and other creditors of appellees have the right to institute an action to recover on account of the over-valuation depends upon the statutes of this State as construed by the courts of this State. (*Converse v. Hamilton*, 224 U. S. 243.) The particular provisions of the statutes that were in force at the time and that should be considered in deciding this question are sections 8 and 25 of the Corporation law, which read as follows:

"Sec. 8. * * * Each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him. * * * Whenever any action is brought to recover any indebtedness against the corporation, it shall be competent to proceed against any one or more stockholders at the same time to the extent of the balance unpaid by such stockholders. * * * Every assignee or transferee of stock shall be liable to the company for the amount unpaid thereon, to the extent and in the same manner as if he had been the original subscriber." (Hurd's Stat. 1917, p. 701.)

"Sec. 25. If any corporation * * * shall dissolve or cease doing business, leaving debts unpaid, suits in equity may be brought against all persons who were stockholders at the time, or liable in any way, for the debts of the corporation, by joining the corporation in such suit; and each stockholder may be required to pay his *pro rata* share of such debts or liabilities to the extent of the unpaid portion of his stock, after exhausting the assets of such corporation." (Hurd's Stat. 1917, p. 703.)

This court does not seem to have been required heretofore to pass on the construction of sections 8 and 25 as applied to a business after it has gone into bankruptcy. Perhaps the case most nearly in point in construing these sections under conditions such as arise here is that of *Parmelee v. Price*, 208 Ill. 544. That was a case where a creditors' bill had been instituted under the Chancery act to enforce the liability of certain stockholders with reference to unpaid subscriptions for stock, and the court said (p. 554): "It appears from the bill that the stock of appellees was paid for partly in cash and partly in property, and that this property was fraudulently over-valued to such an extent that, in fact, only forty per cent of the subscription was paid. While this transaction was voidable as to creditors or other stockholders prejudiced thereby it was binding upon the corporation." (Citing authorities.) And

again the opinion says, on page 555, that under section 8 the stockholder "is directly liable to the creditor whether the assets of the corporation are sufficient to pay its debts or not. The creditor can collect either from the corporation or from the stockholder, as he sees fit. * * * The creditor may sue the corporation and garnish the stockholder at the same time. * * * This, however, is where the stockholder is still liable to the corporation. It is for the unpaid portion of his subscription. In such case an action accrues to the creditor and against the stockholder as soon as the debt * * * falls due. * * * In the case at bar, however, no right of action accrued to the creditor under section 8, *supra*, for the reason that as between the corporation and the stockholder the stock subscription was fully paid." And again, on page 559 the opinion continues: "We hold that a right of action accrues to a creditor against a stockholder whose stock, as between the shareholder and the corporation, has been paid for by property taken at a fraudulent over-valuation, whenever the corporation ceases doing business leaving debts unpaid, and that the creditor may proceed immediately to enforce this right of action in equity, under section 25, *supra*, without first reducing his claim against the corporation to judgment at law. The liability of the stockholder resides in the fact that he has subscribed for and taken stock for which the law requires he should pay, in money or property, the full amount of his subscription. * * * His liability * * * is not dependent upon any call being made upon him by the corporation, as in case where the corporation seeks to collect the same, but is a liability resulting from the statute, consequent upon the fact that he is a shareholder."

It would appear from this decision that the court construed sections 8 and 25 as holding that a stockholder is directly liable to the creditor without any action on the part of the defunct corporation, or the trustee or receiver if one was appointed for the corporation after its failure,

and under these sections of the Corporation act, and others which are somewhat similar in wording on the question here involved, this court in other decisions has substantially held to the same effect. Thus, in *Hunt v. LeGrand Roller Skating Rink Co.* 143 Ill. 118, the court said (p. 121): "It is manifest, however, that the statute provides a remedy in the nature of a creditor's bill and is designed to aid creditors in the collection of their debts." And again, on page 123 of the opinion: "We think it is clear that it was the intention of the legislature, by the enactment of section 25, to afford remedies to creditors of corporations for the enforcement of their private and personal rights." And later, on page 125 of the opinion it is stated: "The apparent scope of the section is merely to provide remedies to individuals for the enforcement of private and personal rights."

In *Alling v. Wenzel*, 133 Ill. 264, in construing section 25 of the Corporation act, the court said (p. 272): "Section 25 authorizes creditors of the corporation to bring suits in equity against the corporation and stockholders to enforce the liability of the latter if the corporation * * * shall dissolve or cease to carry on its business as therein provided. The liability of the stockholder is for his unpaid stock. To the extent it is unpaid he is liable for the debts and obligations of the corporation."

In *Wincock v. Turpin*, 96 Ill. 135, in discussing another section of the Corporation act, the court said (p. 142): "The statute having conferred the right on the depositor, it is as absolutely his individual claim as any claim he may hold against any other individual for or on account of any business transaction."

In *Tibballs v. Libby*, 87 Ill. 142, the court, in discussing the liability under the Corporation act of the stockholder for a corporation debt, said (p. 145): "We take no note of the bankruptcy proceedings, as they cannot affect plaintiffs' rights. Their right to recover against a stockholder

is not taken away by the bankruptcy of the corporation in which he was a stockholder. That fact fixes the liability of the stockholder."

In *Arenz v. Weir*, 89 Ill. 25, in passing on another section of the Corporation act this court said (p. 28): "This insurance company having passed to a receiver, diminishes in no degree the liability of a stockholder to a creditor of the company. The creditor stands on an independent platform above that of the receiver, having no concern with the corporation, and the stockholder is bound, under the law, to answer to him."

Counsel for appellees endeavors to evade the force of the statements of some of these opinions by suggesting that the sections of the Corporation act there under consideration provided for a double liability against the stockholders and were penal in their nature. An examination of those decisions will show that they were not based on the question that the statute would require a double liability or a penalty, but because the statute provided that this obligation rested upon the stockholder for the benefit of the creditor, and the wording of sections other than sections 8 and 25 referred to in some of these decisions is not so materially different from the wording of section 25 that we think the liability of the stockholder to the creditor was intended to be held as any different in character from that provided for in section 25. The reasoning of this court in *Golden v. Cervenka*, 278 Ill. 409, while not with reference to the construction of the provisions of the Corporation statute here under consideration, tends to uphold the conclusion that under section 25 the liability of shareholders was enforceable directly by the creditors.

Counsel for appellees endeavors to show that the decisions of this court in *Coleman v. Howe*, 154 Ill. 458, *Garden City Sand Co. v. American Refuse Crematory Co.* 205 id. 42, *Sprague v. National Bank of America*, 172 id. 149, and *Johnson v. Canfield-Swigart Co.* 292 id. 101, lay down a

doctrine at variance with the claim of counsel for appellant on the question now under discussion. We have examined all of the authorities on this question, and think none of them, when fairly construed, uphold appellees' contention that any claim on account of unpaid subscriptions, arising because of over-valuation, is an asset of the corporation that should go into the hands of a trustee and be collected by him. As was said by this court in *Garden City Sand Co. v. American Refuse Crematory Co. supra*, on page 48: "In such a case the corporation may agree with the stockholder as to the value of the property to be taken in payment for the stock, but the transaction must constitute a valid contract of bargain and sale in good faith, in the exercise of fair and honest judgment." And again, in *Sprague v. National Bank of America, supra*, the court said, one page 166: "An accounting as to the value of such property and effects and of its obligations to its creditors will determine the net value of the property and effects received by the Pacific Company. In so far as the property and effects of the cable company exceeded the indebtedness of the company the stock in the Pacific Company should be deemed paid. Therefore the position of each appellant who held stock interest in the California corporation is, that instead thereof he is the holder of stock in the Illinois corporation paid up to the extent of the net value of his interest in the property and effects which were transferred from the California corporation to its successor, the Illinois corporation, and to that extent only, and therefore liable to the creditors of the latter corporation to the extent his stock is unpaid."

The argument of counsel for appellant is that the right of the trustee in bankruptcy to sue the stockholders depends upon whether the liability of a stockholder for the unpaid portion of his subscription was an asset of the corporation, and that if it was an asset, then it is clear the corporation before and the trustee after bankruptcy could sue to recover

it. If it was not an asset the corporation could not bring suit, nor could the trustee do so after bankruptcy. In this case the stockholders, as individuals, after they had subscribed for their stock in the new company, without placing any value upon the property and business of the old company, offered it to the new corporation in full payment of their subscriptions, which offer, while acting as directors of the corporation, they accepted, and they were thereby released, as subscribers, from all liability to the corporation, but if they over-valued the property they were liable to the creditors for such over-valuation but not to the bankrupt corporation or to its trustee. This conclusion seems to be in accord with the decisions of this court in cases where it has passed directly or indirectly on this question. Many of the States in this country other than Illinois have statutes more or less similar to ours on this question. In some of them the statute gives the right of action to the corporation or to its creditors, and in discussing these statutes and the rights of the creditors under them in Thompson on Corporations (vol. 2—2d ed.—sec. 1372,) that author says: "Under these statutes, almost without exception, the liability imposed is to the creditor. * * * Under all such statutes it is a self-evident proposition that the party in whose favor the liability is imposed has the right of action to enforce it. * * * Whether a receiver can maintain an action must depend, in the main, on the terms of the particular statute. If the statute makes the penalty a debt due to the corporation for a breach of duty on the part of the directors toward the corporation, then it is clear that the receiver, who succeeds to the right of the corporation, can maintain the action. The real test as to this right to sue would probably depend on the question whether the penalty is made by the statute a part of the corporate assets which it is the duty of the receiver to collect and distribute ratably among all the creditors, or whether the penalty is made a debt due from the directors jointly or severally to

any creditor of the corporation." After construing some of the statutes in other jurisdictions, the Federal and other courts have held that the right to collect rests with the creditor and not with the trustee in bankruptcy. (See *Courtney v. Georger*, 228 Fed. 859; *Babbitt v. Reed*, 236 id. 42; *Breck v. Brewster*, 153 App. Div. 800.) And in a very recent case the Federal court of appeals in construing the Illinois statute, after considering at some length the statute and decisions of Illinois and other courts on this question, held in *Seegmiller v. Day*, 249 Fed. 177, that the liability created under this statute was personal to the creditors, one which could not be invoked by the corporation, did not become an asset of the bankrupt estate and is not enforceable by the trustee. The conclusion of the Federal court in that case is in full accord with the conclusion of the Federal court in *In re Beachy & Co.* 170 Fed. 825, where the Illinois statute was also construed, and it was stated (p. 828): "It seems clear, therefore, that this statutory cause of action belongs exclusively to the creditors. * * * Such a claim may be enforced by the creditor in any court having jurisdiction quite independently of the bankruptcy proceedings."

Necessarily the decisions just referred to from the Federal courts are not controlling here, because the Federal courts have repeatedly decided that the decisions of the State courts in construing their own statutes on such a question as this are controlling on the Federal courts, but those decisions are in a way persuasive, because they show the judgment of at least two Federal courts as to the construction that would *prima facie* be placed on the Illinois statute on this question, and in our judgment the construction given the statute by the Federal courts in the two cases just referred to is the fair one, and also in full accord with what has been said by this court whenever called upon to construe these or similar sections of the Corporation act.

Counsel for appellees relies very strongly upon the decision of this court in *Lane v. Nickerson*, 99 Ill. 284. It is clear from a reading of the opinion in that case that the liability against the stockholder was for the balance of an unpaid subscription for stock, and was, under the reasoning of the cases already cited, an asset of the corporation, and therefore collectible by the trustee in bankruptcy or the assignee or receiver of the estate and not by the creditors. In view of the facts in that case we do not consider the conclusion reached therein as any way controlling on this question.

The Corporation act of this State was re-written and went into force on July 1, 1919. As re-drawn, sections 8 and 25 were changed and placed under the title of "Insolvency." (Hurd's Stat. 1921, pp. 802, 803.) It is clear that under the re-drawn act it was the intention of the legislature to authorize any creditor to bring suit in equity to enforce the stockholders' liability under the statute for the debts of the corporation. As this amended statute was in force at the time the decree was entered in the trial court in this case, it is obvious that under said act the decree was improperly entered holding that a court of chancery did not have jurisdiction to enforce the claim against the stockholders for the unpaid liabilities of appellant.

The trial and Appellate Courts wrongly construed this statute as giving the right of action to the trustee in bankruptcy. On the contrary, under this statute as here construed, the bill of this creditor should not have been dismissed for want of equity. The conclusion necessarily follows that the judgments of the trial and Appellate Courts must be reversed and the cause remanded to the superior court for further proceedings in harmony with the views herein expressed.

Reversed and remanded.

(No. 14426.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. PETER FIERETO *et al.* Plaintiffs in Error.

Opinion filed April 19, 1922—Rehearing denied June 7, 1922.

1. CRIMINAL LAW—*definition of robbery.* The crime of robbery consists in the felonious and violent taking of money, goods or other valuable thing from the person of another by force or intimidation.

2. SAME—*description and value of the property taken in robbery are not material if it has a value.* The gist of the offense of robbery is the force or intimidation and taking from the person of another, against his will, a thing belonging to him or in his custody, and the property taken need not be accurately described, and its value is immaterial provided it is shown to have a value.

3. SAME—*money taken in a robbery need not be described.* Money taken in a robbery need not be described, as the term itself, without any description, imports value, and it is only in an indictment for larceny or where the degree of the offense depends upon the value that the money taken must be described.

4. SAME—*when stock instruction on circumstantial evidence should not be given.* The stock instruction that "circumstantial evidence is competent legal evidence" and is sufficient to authorize a conviction if the jury are convinced of the truth of the charge, "beyond a reasonable doubt, from facts and circumstances in proof," should not be given where there is no circumstantial evidence; but the error in giving the instruction is not ground for reversal if the direct evidence shows that the defendants are guilty beyond a reasonable doubt.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. M. L. McKINLEY, Judge, presiding.

W. W. O'BRIEN, (THOMAS E. SWANSON, of counsel,) for plaintiffs in error.

EDWARD J. BRUNDAGE, Attorney General, ROBERT E. CROWE, State's Attorney, and GEORGE C. DIXON, (EDWARD E. WILSON, and CLYDE C. FISHER, of counsel,) for the People.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Peter Fiereto and Joe Sacrino, plaintiffs in error, were indicted with Joe Siegel and Jack Morgan, otherwise called George Davis, for the crime of robbery with a deadly weapon, alleged to have been committed on January 22, 1921, by making an assault upon Patrick Geoghan and taking from him \$3100 lawful money of the United States and two revolvers of the value of \$10, all of which were personal goods and property of Mary Hogan in the care, custody and control of Geoghan. Joe Siegel and Jack Morgan, otherwise called George Davis, entered pleas of guilty. The plaintiffs in error were tried, found guilty and sentenced to the penitentiary.

The robbery occurred at about 11:30 in the forenoon of January 22, 1921, in Mary Hogan's place of business, variously called by the witnesses a soft drink parlor or saloon. The witnesses for the People were Thomas Murphy, a bar-tender, Patrick Geoghan, an employee or bar-tender, George Davis, who said he was called Jack Morgan, Joe Siegel and a detective sergeant. All of the witnesses except the detective sergeant were present at the time of the robbery and their testimony was direct and positive to the following facts: There were six men engaged in the commission of the crime, four of whom were indicted and the other two not apprehended. The robbery was planned in Fiereto's saloon, on Orleans street, and all of the men were provided with revolvers. They left Fiereto's saloon and drove around for a while and stopped the car at the south side of the Hogan place, at 201 East Ohio street. One man stayed in the car, another stood outside and four went inside. Murphy, a bar-tender, was behind the bar and they ordered beer, and as he drew it they covered him with revolvers and took his watch and money and rifled the cash register. They returned the watch on the plea of Murphy

that it was a valued keepsake which had belonged to a deceased brother. They demanded that Murphy should open the safe, but he told them he did not have the combination. Geoghan had been sent to the Lake Shore Trust and Savings Bank, where he obtained \$3100 of Mrs. Hogan's money for the purpose of cashing workmen's checks on Saturday night. The man who stood outside the saloon came in and said, "Here he comes!" and as Geoghan entered the place Murphy had been backed into a corner and was held up behind the bar. Geoghan was ordered to hold up his hands and they took from him the \$3100 and \$6 of his money. They ordered him to open the safe, but he told them he did not have the combination, and they said he was only a bar-tender and did not have it. The robbers put Geoghan and Murphy down in the basement and went back to Fiereto's saloon and there divided the money.

The plaintiffs in error denied the commission of the crime. Fiereto testified that he was living on January 22, 1921, at his mother's home and was working every day until twelve or one o'clock at night, and his father testified that Peter worked every night until one o'clock and on the morning of January 22 got up at 11:30. Sacrino testified that his business was driving a laundry wagon; that he was at home at his mother's on January 22 at about 11:30 o'clock in the morning, and his sister testified that on that day he was home the whole day. The plaintiffs in error were proved guilty beyond any reasonable doubt, and the evidence to sustain their defense of an alibi was so indefinite and came from such sources that the jury could not be expected to give it any credit.

It is argued that there was no proof as to the value of the two revolvers mentioned in the indictment or that they were the property of Mrs. Hogan, and that there was no evidence that the money taken was lawful money of the United States. The revolvers were, of course, of some value, but perhaps there was no proof of ownership.

The money taken was variously described by the witnesses. Geoghan said it was \$3100 of Mrs. Hogan's money and \$6 of his own. Murphy said there was \$2700, and Davis said there was \$2700 in five and ten-dollar bills, and he thought there was some silver. The crime of robbery consists in the felonious and violent taking of money, goods or other valuable thing from the person of another by force or intimidation. The gist of the offense is the force or intimidation and taking from the person of another, against his will, a thing belonging to him or in his custody. The property taken need not be accurately described, and its value is immaterial as long as it is shown to have a value. Except in an indictment for larceny or where the degree of the offense depends upon value, money need not be described, and the term itself, without any description, imports value. (*People v. Clark*, 256 Ill. 14.) It is unbelievable that Geoghan went to the Lake Shore Trust and Savings Bank and drew out \$3100 of Mrs. Hogan's money to cash checks when the money had no value. There was also evidence that the robbers took some silver from Geoghan, and that term imports value. The evidence fulfilled the requirements of the law.

The instructions presented to the court, as frequently happens, were of the ready-to-use kind without any adjustment to the facts of the case, and many of them were substantial duplicates. Among those given to the jury was this old acquaintance:

"The jury are instructed as a matter of law that circumstantial evidence is competent legal evidence and if the minds of the jury are convinced of the truth of the charge in the indictment in this case beyond a reasonable doubt from facts and circumstances in proof, this is sufficient to authorize a conviction."

Counsel for plaintiffs in error do not claim that it would be wrong to enlighten a jury with the information that evidence is evidence and enough of it is enough, in a case

where such rules of law are applicable to the evidence, but they protest that the instruction was misleading in this case and should not have been given because there was no circumstantial evidence at all. Their argument is that the instruction would lead the jury to suppose that there were facts and circumstances proved which might authorize a conviction; that the jury would not surmise that the court was merely lecturing on the law of evidence, and the instruction practically excluded the evidence of an alibi. The instruction should not have been given. (*Cunningham v. People*, 210 Ill. 410; *Kevern v. People*, 224 id. 170.) There may be conditions of the evidence in which the giving of the instruction would necessitate a reversal, but in this case the direct evidence was convincing, and we do not see how the verdict could have been different or that the jurors were, in fact, misled to the detriment of the plaintiffs in error.

The court gave an instruction at the request of the plaintiffs in error fully stating the law relating to the defense of an alibi, advising the jury that such a defense was as proper and legitimate as any other, and if it was sufficient to raise any reasonable doubt as to whether a defendant was at the place at the time of the commission of the crime the verdict should be not guilty. Complaint is made that the court refused to give another instruction concerning that defense, which was substantially like the one given but not as complete. It was not error to refuse to read two instructions of the same character.

Complaint is also made that the court erred in refusing an instruction stating that a confession, to be admissible, must have been freely and voluntarily made and must not have been induced by the remotest fear or injury or the slightest hope of benefit or reward or anything whatever, and that a confession uncorroborated would not justify a conviction. There was no evidence of any confession. The detective sergeant testified that Sacriño said he got \$500 out of it, which was an admission of a fact but

not a confession of a crime. If, however, the jury could have regarded it as a confession, the court gave an instruction on that subject of which the refused instruction was a substantial duplicate.

The judgment is affirmed.

Judgment affirmed.

(No. 14388.—Reversed and remanded.)

MARY JEANETTE MCNAMARA *et al.* Appellees, *vs.* JOHN HAMILTON MCNAMARA, Appellant.

Opinion filed April 19, 1922—Rehearing denied June 7, 1922.

1. ADOPTION—*status of adopted child is fixed by law of domicile—descent.* The rights, duties and capacities of an adopting parent and of the adopted child are fixed by the law of the domicile, which not only establishes the personal relation but controls the descent of personal property of one dying intestate, and under the law of comity and the full faith and credit clause of the Federal constitution such status will be recognized in other jurisdictions, but the law of the jurisdiction where real estate is located will determine the descent of such property.

2. CONFLICT OF LAWS—*decision of highest court construing law of its State is conclusive in other jurisdictions.* The decision of the highest court of one State construing the law of that State is conclusive in the courts of every other State and in the Supreme Court of the United States.

3. DESCENT—*child made legitimate by adoption in another State may inherit real property in Illinois.* An illegitimate child made legitimate by adoption, in accordance with the laws of the State of his domicile as construed by the highest court of that State, must be regarded in Illinois as the heir of the adopting parent and entitled to inherit real property in this State.

4. ESTOPPEL BY VERDICT—*doctrine of estoppel by verdict stated.* The judicial determination of a fact involved in litigation is conclusive in a subsequent suit between substantially the same parties when such fact is again involved.

FARMER, J., dissenting.

APPEAL from the Circuit Court of Stephenson county;
the Hon. FRANKLIN J. STRANSKY, Judge, presiding.

ROBERT P. ECKERT, guardian *ad litem*, and DOUGLAS PATTISON, for appellant.

A. J. CLARITY, and R. R. TIFFANY, (MARY JEANETTE McNAMARA, *pro se*,) for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

John H. McNamara, of St. Paul, Minnesota, was the owner of real estate in Freeport, in Stephenson county, in this State. He died on or about March 30, 1914, intestate, leaving Anna E. McNamara, his widow, Mary Jeanette McNamara and Margaret J. McNamara, (now Margaret J. Thomas,) his daughters, and John A. McNamara, his son, his only heirs-at-law. John A. McNamara lived in California and died at Sunland, in Los Angeles county, on or about May 10, 1916, intestate, and he had never been married. Mary Jeanette McNamara, of Los Angeles, California, filed her bill in this case in the circuit court of Stephenson county, alleging that by the death of her father, John H. McNamara, she and her sister, Margaret, and her brother, John, became seized in fee, as tenants in common, of the premises in Freeport by descent, subject to the dower of their mother, the widow, and that by the death of John A. McNamara intestate his undivided one-third descended in equal parts to the complainant and her sister, Margaret, subject to the dower of their mother. The bill alleged that John Hamilton Bettencorte, also described as John Hamilton McNamara, a minor, claimed to have some right, title or interest in the real estate as heir-at-law of John A. McNamara, but denied that he had such interest. The bill prayed for partition subject to dower, and made the minor and various tenants of the property defendants. A guardian *ad litem* was appointed for the infant defendant named in the bill as John Hamilton Bettencorte and also known as John Hamilton McNamara. The guardian *ad litem* filed

an answer and followed the answer with a cross-bill, alleging the residence of John A. McNamara in California and that there was a statute of that State providing for the adoption of children, which was set forth in the cross-bill. It was further alleged that under and by virtue of that statute John Hamilton McNamara, an illegitimate child of John A. McNamara, born on October 24, 1914, was adopted by his father, John A. McNamara, and by the law of California was deemed for all purposes legitimate from the time of his birth; that the question of such adoption and the status of John Hamilton McNamara as heir-at-law had been litigated and finally and conclusively settled in the courts of California; that the complainant, Mary Jeanette McNamara, and Margaret J. McNamara, were parties to that litigation, in which it was decided that John Hamilton McNamara had been made legitimate by adoption by his father, John A. McNamara, and that by virtue of such adoption he was the owner in fee simple of an undivided one-third of the real estate, subject to the dower of the widow of John H. McNamara. The original bill was amended by averring that the complainant in the cross-bill was born to Rosalie Nettie Bettencorte on October 24, 1914, while she was the lawful wife of Antoine F. Bettencorte, and that he was not the son by adoption, or otherwise, of John A. McNamara or related in any way to him. The cross-bill was answered, and upon a hearing the chancellor entered a decree finding the title to the property as alleged in the original bill as amended, finding that John Hamilton McNamara had no right, title or interest in or to the real estate and ordering partition and assignment of dower. From that decree the minor, by the guardian *ad litem*, has appealed to this court.

The following facts were proved on the hearing: A chapter entitled "Children by adoption" is a part of the civil code of California, and consists of section 221 to section 230, inclusive. Section 221 provides that any minor

may be adopted by any adult person in the cases and subject to the rules prescribed in the chapter. Subsequent sections contain various provisions concerning adoption and proceedings before a judge for that purpose and declare the effect of adoption. The concluding section is as follows:

"Sec. 230. *Adoption of illegitimate child.*—The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to this adoption."

After the death of John A. McNamara, Rosalie Nettie Bettencorte, under the name of Rosalie McNamara, became administratrix of his estate and guardian of the minor, John Hamilton McNamara. She filed a petition in the superior court of Los Angeles county for a family allowance for her as widow and John Hamilton McNamara as minor child of the deceased. On that petition the court allowed \$75 per month out of the estate of John A. McNamara. Mary Jeanette McNamara filed in the superior court her petition to revoke the letters of administration and to set aside the order for a family allowance on the ground that the administratrix was not the widow of John A. McNamara and John Hamilton McNamara was not his minor child, and that the petitioner and her sister, Margaret J. McNamara, were the next of kin of the deceased and entitled to administration. The petition alleged that at all times after July 29, 1913, the administratrix was the lawful wife of Antoine F. Bettencorte. The administratrix answered, denying the charge that John Hamilton McNamara was not the son of John A. McNamara; denying that at any time after July 29, 1913, she lived with Bettencorte as his wife; alleging that John A. McNamara in his lifetime publicly acknowledged John Hamilton McNamara

as his own child, received him into his family and otherwise treated him as his legitimate child, and that said child was thereby adopted by John A. McNamara as his legitimate child and thereupon became such legitimate child from the time of his birth, as provided by the statute. The administratrix petitioned for a partial distribution of the estate before final settlement, and Mary Jeanette and Margaret J. McNamara demurred to the petition. The petition was amended and Mary Jeanette and Margaret J. McNamara answered it, denying that John A. McNamara had adopted the child as alleged and that he thereby became legitimate. The superior court denied the petition to revoke the letters of administration, ordered partial distribution, and vacated without prejudice the order for \$75 per month for a family allowance. Mary Jeanette and Margaret J. McNamara appealed to the Supreme Court of California, where the order of the superior court was affirmed. *In re McNamara's Estate*, 181 Cal. 82.

The court found the following facts: That John A. McNamara died on or about May 10, 1916, at Sunland, Los Angeles county, California, a resident of said county; that John Hamilton McNamara was born on October 24, 1914, at Mountain View, Santa Clara county, California; that John A. McNamara was the father of John Hamilton McNamara and Rosalie Nettie Bettencorte was his mother and his guardian; that Rosalie Nettie Bettencorte was married to Antoine F. Bettencorte on or about July 29, 1913, and they lived together as husband and wife at Mountain View until December 24, 1913, when they separated and did not thereafter live or cohabit together as husband and wife; that on October 25, 1915, in the superior court of Santa Clara county, in a suit by Bettencorte against Rosalie Nettie Bettencorte for divorce, an interlocutory decree for divorce was entered, which was made final on or about November 23, 1916; that from about December 24, 1913, John A. McNamara and Rosalie Nettie Bettencorte lived

and cohabited together as husband and wife except during a few very brief periods stated in the findings; that during the existence of their relations he maintained her, introduced her at various times as his wife, received John Hamilton McNamara into the family a week after his birth, and the child at all times resided in the family and was provided and cared for and otherwise treated as his legitimate child, and that John A. McNamara in his lifetime publicly acknowledged John Hamilton McNamara as his own child and provided and cared for him as a member of his family up to the date of the death of John A. McNamara; that from and after December 24, 1913, Bettencorte had no intercourse or communication of any kind with Rosalie Nettie Bettencorte and was absent and separated from her at the period during which John Hamilton McNamara must in the course of nature have been begotten.

The adoption of children was unknown to the common law but was known and recognized by the civil law. The principle has been adopted in most of the States by statute, and the rights, duties and capacities of the adopting parent and adopted child are determined by the provisions of the several statutes. Such rights and duties depend upon the status, (2 Austin on Jurisprudence, 710,) and such status is fixed by the law of the domicile, which not only establishes the personal relation but controls the descent of personal property of one dying intestate, while the law of the jurisdiction where real estate is located will determine the descent of such property. It will therefore be seen that there are two questions to be considered: First, whether the status of John Hamilton McNamara as a legitimate child of John A. McNamara has been fixed and established under the law of California, which was the domicile of the parties; and second, whether this State will recognize that status, which by our law controlling the descent of real estate would entitle him to the property of John A. McNamara as his heir-at-law. These separate

questions must be answered in the affirmative to entitle John Hamilton McNamara to the real estate of his father, subject to the dower of the widow.

The first question has been finally settled, both as one of fact and law, by the decision of the Supreme Court of California in the litigation in that State involving the status of John Hamilton McNamara on these grounds: The litigation was between the same parties as in this controversy, and the question of the status of John Hamilton McNamara was the subject of the litigation. Where a fact is once determined the finding is conclusive as to that fact in a subsequent suit between substantially the same parties. (*Hanna v. Read*, 102 Ill. 596; *People v. Hill*, 182 id. 425; *Hanna v. Drovers' Nat. Bank*, 194 id. 252; *In re Stahl*, 227 id. 529; *Chicago Title and Trust Co. v. Moody*, 233 id. 634; *MacDonald v. Dexter*, 234 id. 517.) The rule was declared and applied as to a foreign decree of adoption in *VanMatre v. Sankey*, 148 Ill. 536. As a question of law, the decision of the highest court of California construing the law of that State is conclusive in the courts of every other State and in the Supreme Court of the United States. (*Hood v. McGehee*, 237 U. S. 611.) The Supreme Court of California said that section 230 provides for legitimation rather than for adoption in the ordinary sense, but the code provided for legitimation by adoption, and the evidence was sufficient to sustain a finding on the issue as to adoption. The status of John Hamilton McNamara as legitimate from his birth, with all the rights incident to that status in California, is beyond dispute.

The most comprehensive review of the origin and history of adoption and the decisions relating to the status and capacity for inheritance of an adopted child is to be found in the opinion of Mr. Chief Justice Gray in *Ross v. Ross*, 129 Mass. 243; 4 Am. R. C. 1382. In that case there had been an adoption in Pennsylvania and the adopting parent afterward removed to Massachusetts, and the question was

whether the adopted child could inherit real estate in Massachusetts upon the adopting parent dying there intestate. In *Keegan v. Geraghty*, 101 Ill. 26, the court quoted from *Ross v. Ross*, *supra*, as follows: "It is a general principle that the status or condition of a person, the relation in which he stands to another person and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile, and that this status and capacity are to be recognized and upheld in every other State so far as they are not inconsistent with its own laws and policy." The case was again cited as authority in *Ryan v. Foreman*, 262 Ill. 175.

In *VanMatre v. Sankey*, *supra*, Caroline C. Sankey was adopted by a proceeding in a court of common pleas of Lycoming county, Pennsylvania, by Samuel Sankey. It was contended that the statute of Pennsylvania was not complied with, but it was held that the determination of the Pennsylvania court, the jurisdictional facts being stated in the petition, was conclusive of its own jurisdiction and of the status. It was held that upon the death of Samuel Sankey without other children his estate in this State descended to Caroline C. Sankey, the adopted child, and that she was capable of inheriting from him in this State in all respects as if she were his own child born in lawful wedlock.

In *Ross v. Ross*, *supra*, the court commented upon the law of adoption of Pennsylvania, but the decision was not upon the ground that the statutes were the same. On the contrary, the court pointed out differences in regard to the consent of the wife of the adopting father and to the inheritance of estates limited to heirs of the body or inheritance from the kindred or through the children of the father, and it was said that none of these things were material. Our statute is copied from the Massachusetts statute and contains the same limitations as to the adopted child taking property from the lineal or collateral kindred of the adopting parent by the right of representation.

The recognition of adoption in another State rests both upon the doctrine of comity, which is essential to the maintenance of proper relations between the States, and article 4 of the Federal constitution, providing that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. The rule in both cases is subject to the qualifications that one State will not recognize a status contrary to its own laws or public policy and that the descent of real estate is governed by the law of the situs. The court in *Keegan v. Geraghty*, *supra*, recognized and gave full effect to the adoption of Mary Ann Keegan in Wisconsin, but necessarily held that the statute of this State controlled as to inheriting land in this State. The statute of Wisconsin made an adopted child, for the purpose of inheritance and all legal consequences incident to the status of parent and child, the same as if born in lawful wedlock, limiting that right only by a provision that the child should not be capable of taking property expressly limited to the heirs of the body or bodies of the petitioner or petitioners. Our statute added to that condition the further limitation that the adopted child should not be capable of taking property from the lineal or collateral kindred of such parents by right of representation. The court recognized fully that the adopted child had every right in this State that a child adopted here under our law would have had, but held that under our statute the adopted child could not inherit from her half-sister, Mary Gertrude Keegan, who was sole heir of her father according to our Statute of Descent. That decision was carefully explained and the basis of it made clear in *Van-Matre v. Sankey*, *supra*, and it can have no influence whatever on the question whether John Hamilton McNamara can inherit under our Statute of Descent from John A. McNamara, the adopting parent.

As before stated, neither the rule of comity nor the full faith and credit clause of the Federal constitution requires

the courts of one State, in deciding upon the descent of real estate, to recognize and give force and effect to the statute of another State contrary to its own law. (*Clarke v. Clarke*, 178 U. S. 186; *Olmsted v. Olmsted*, 216 id. 386.) The case of *Hood v. McGehee*, *supra*, came within the rule under the Federal constitution. The children of the confederate General Hood had been adopted in Louisiana by George T. McGehee, and the Statute of Descent of Alabama excluded children adopted by proceedings in other States. It was held that courts of Alabama were not required to recognize the adoption contrary to the law of Alabama. The rule of comity in such a case is not recognized in England because of what is called the Statute of Merton, which consisted of an entry on the minutes of parliament of a refusal to grant the requests of the bishops that the marriage of parents subsequent to the birth of a child should render it legitimate. We recognize the status of marriage not prohibited by our law and the status of widowhood, but in determining the dower of a widow it is governed by the law of this State because the property is located here; so we recognize the natural relation of parent and child, but the children of a British subject would inherit equally in this State and not according to the English law. We must recognize the status of John Hamilton McNamara as created by the law of California to be legitimate from his birth, and that being so, he is the sole heir of his father and entitled to the real estate in this State. This is not prohibited either by any express provision of law or by public policy. It is not contrary to public policy as manifested by statutes. Section 15 of the act concerning bastardy (Harker's Stat. p. 349,) provides that if the mother of any bastard child and the reputed father shall at any time after its birth intermarry, the child shall in all respects be deemed and held legitimate. That rule was applied, in connection with the Statute of Descent, in *Hall v. Gabbert*, 213 Ill. 208. The legislatures of California and of

this State, declaring public policy, have provided that a father may make his illegitimate child legitimate, and the method, whether by marrying the mother or as provided in the California statute, is of no importance. The statutes have no tendency to encourage illicit relations and have the only object of permitting a benefit or act of justice to the unfortunate. The public policy of the States is the same. Neither is the conclusion contrary to the decisions of the court as manifesting public policy. In *Butterfield v. Sawyer*, 187 Ill. 598, a deed conveyed a life estate to Adeline Butterfield, with remainder to her child or children that might be living at the time of her decease, and in default of a child or children to the heirs generally of Adeline Butterfield, excepting a brother of Adeline. The widow adopted a child, and it was held that the remainder to the heirs generally passed to the adopted child, though the act authorizing adoption was not in existence when the deed was made. In *Flannigan v. Howard*, 200 Ill. 396, the court held that a child adopted after a will was made was within the meaning of section 10 of the Statute of Descent, which provides that if a child shall be born to a testator after his will is made and there is no provision made in the will for such child and no intention to disinherit appears, the legacies and devises shall be abated to raise an amount equal to that which the child would have received had the parent died intestate. The argument that the adopted child was not the sort of child mentioned in the Statute of Descent was denied. In *Ryan v. Foreman*, *supra*, it was held that an adopted child was entitled to a continuation of a police pension after the widow's death the same as the natural child, under a law allowing a pension to a child under sixteen years of age of a deceased pensioner. These cases illustrate the attitude of the court toward adopted children and are decisive that no narrow view of the relation will be taken to defeat the law.

The decree is reversed and the cause remanded, with directions to enter a decree finding Mary Jeanette McNamara, Margaret J. Thomas and John Hamilton McNamara each entitled to an undivided one-third of the real estate subject to the dower, and for partition and assignment of dower accordingly.

Reversed and remanded, with directions.

Mr. JUSTICE FARMER, dissenting:

The crux of the question here involved is, conceding appellant's status to be that of an adopted child of John A. McNamara under the laws of California, do the rights flowing from such status there, confer on him the right to inherit real estate of his adoptive father in Illinois? The authorities unquestionably hold that if such adoption confers the same rights as adoption in Illinois would confer he is entitled to inherit the real estate here. Under the laws of Illinois appellant could not have been adopted by McNamara. He could only adopt the child of someone else, and such adoption is required to be by a proceeding in court and a record of it preserved. Neither can an illegitimate child be legitimated in Illinois by the father acknowledging paternity without also marrying the mother. Title to land in Illinois is not to be transferred by operation of the laws of a foreign State but only in the mode prescribed by the laws of this State. (*City Ins. Co. v. Commercial Bank*, 68 Ill. 348.) The general rule that the status of a person as fixed by the law of the domicile will be recognized in other jurisdictions for the purpose of descent of real estate is subject to the qualification that unless the rights flowing from the status of the domicile are consistent with and not contrary to the laws and policy of this State the law of the foreign State cannot control the right to inherit land in this State. The comity between the States does not require one State to recognize the right of another State to make laws

to control the inheritance of land in another State. The law of the State in which the land is situated governs the descent, and not a decree of a court or a statute of another State. What was done in California to fix the status of appellant in that State as the adopted child of McNamara could have no such effect under our laws. The public policy of this State, as declared by our laws, does not permit the adoption of an illegitimate child by the father. Our law permits the legitimation of such a child, but that must be done by the father marrying the mother and acknowledging the child to be his. The status of appellant, therefore, was created in California by virtue of laws contrary to and inconsistent with the laws and policy of this State, and to give him the right to inherit land in Illinois it must be held that the transmission of land by inheritance in Illinois is governed not by our law but by the law of California. This, it was held in *Keegan v. Geraghty*, 101 Ill. 26, will not be permitted. The proceeding in California which fixed appellant's status in that State is not recognized by the laws of this State as an adoption or legitimation, and had the same thing been done in this State that was done in California it would not have given appellant the right to inherit the land. For the courts of this State to give him that right requires holding the laws of California conferred rights on residents of that State to inherit land in Illinois which our laws deny to residents of this State. That denies the sovereignty of the several States to determine the rules of descent and heirship of property within their respective borders, and, as I understand, is contrary to the decisions on that question. In my opinion the decree of the circuit court should be affirmed.

(No. 14439.—Reversed and remanded.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. WILLIAM GARDINER, Plaintiff in Error.

Opinion filed April 19, 1922.

1. CRIMINAL LAW—*when errors may be considered although not properly preserved for review.* Where the evidence in a criminal case is close and the prosecuting attorney, unhindered by the court, has taken improper advantage of the inexperience of counsel for the accused to his manifest prejudice, the Supreme Court will consider the errors so intervening notwithstanding they are not properly preserved for review.

2. SAME—*instruction should not leave jury to decide what are the essential elements of the crime charged.* An instruction should not submit to the jury the legal question as to what are the material facts or final essential elements of the crime with which the accused is charged.

3. SAME—*conviction secured in total disregard of the law can not be sustained.* One charged with crime has the right to be tried in accordance with the law of the land, and a conviction secured in total disregard of such law cannot be sustained even though there may be enough competent evidence in the record to authorize a verdict of guilty.

4. SAME—*when instruction as to criminal negligence is erroneous.* An instruction is manifestly erroneous which states that criminal negligence is an unlawful act done carelessly or negligently or a lawful act done without due caution or circumspection; that carelessness is criminal and within the limits supplies the place of direct criminal intent; and that gross carelessness resulting in injury to others is criminal even though the act done is lawful.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. THEODORE BRENTANO, Judge, presiding.

ROBERT E. TURNEY, (THOMAS E. SWANSON, of counsel,) for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, ROBERT E. CROWE, State's Attorney, and JAMES B. SEARCY, (EDWARD E. WILSON, and CLYDE C. FISHER, of counsel,) for the People.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This writ of error is prosecuted to review a judgment of the criminal court of Cook county finding plaintiff in error guilty of manslaughter and committing him to the penitentiary

The evidence shows that plaintiff in error was in the office of one Welsh, a postal employee, in the afternoon of January 27, 1920; that Welsh had a revolver in his office; that plaintiff in error took the revolver and put it in his coat pocket; that he went from the office of Welsh to 3035 Indiana avenue, Chicago; that five or six physicians occupied a suite of offices at this number and that plaintiff in error frequently called on them; that he was addicted to the use of intoxicating liquors, and on several occasions he had requested these doctors to issue him prescriptions for whisky; that on this occasion he arrived about seven o'clock P. M.; that he came to the office to see one of the doctors about some glasses that he had left there; that the doctors were busy and that he joked with the people who were sitting in the waiting-room; that he was in a happy frame of mind; that the deceased, Dr. Robert S. Bentley, came from his office into the waiting-room and stood leaning against the wall, smoking a cigar; that plaintiff in error walked up to him and said in a jovial manner, "I want to show you a trick I played on Welsh;" that he pulled the revolver out of his pocket while he was saying this; that the revolver was discharged, the bullet striking deceased in the heart; that deceased groaned and fell to the floor; that plaintiff in error exclaimed, "I have shot my best friend! I did not know the gun was loaded! I would give \$50,000 or my life if somebody would tell me that the doctor is not dead!" that other physicians rushed out into the waiting-room and examined deceased and told plaintiff in error that he was dead; that he sat down and cried, saying, "What have I done? What will I do? I have

shot my best friend!" that he remained in the waiting-room until he was placed under arrest.

Plaintiff in error is a one-armed man, was fifty-one years of age and had lived in Chicago about twenty-five years. He is an inventor of electrical appliances and has been connected with a number of storage battery companies throughout the country. The assistant State's attorney who conducted the prosecution examined plaintiff in error at great length with respect to his connection with certain battery companies which he had promoted, and sought to show that he had defrauded many people by selling them worthless stock in such companies. He also cross-examined him at great length with respect to his moral character, and sought to show that he had abandoned his family and had lived in an open state of adultery with a woman in Chicago. The cross-examination covers more than thirty pages of the printed abstract, and at least half of it was on matters wholly foreign to the issue. The character of the cross-examination was seriously prejudicial and its manifest purpose was to wrongfully influence the jury. Not satisfied with this, the prosecuting attorney argued to the jury that plaintiff in error had swindled innocent people of their earnings on many different occasions and that he was otherwise a worthless character. He ridiculed the contention of plaintiff in error that he did not know the gun was loaded and that he was playing a joke on his friend Welsh, and argued to the jury that it was not a joke to the widow and family of the deceased and that by his conduct he had deprived the family of their means of support. Most of this irrelevant evidence and improper argument is in the record without objection. Counsel who tried the case in the criminal court is not the same counsel appearing here, and he seems not to have been familiar with the rules of evidence or with the practice in a criminal case. The fact that a person charged with crime is poorly defended will not justify a reversal of the judgment where

it is reasonably supported by the evidence, (*People v. Schulman*, 299 Ill. 125,) but where the evidence is close, as it is in this case, and it is clear that the prosecuting attorney has taken advantage of the accused because he was poorly represented and the trial court has permitted such advantage to be taken, then we will consider the errors notwithstanding the failure to properly preserve the questions for review. Although there may be enough evidence in a record, in addition to incompetent testimony, to justify a conviction, a defendant has a right to a trial by a jury and not by this court. He has a right to be tried in accordance with the law of the land, and a conviction secured in total disregard of that law cannot be sustained. Respect for the law and its proper administration demands that persons charged with crime shall not be convicted upon incompetent evidence unless this court can say that the admission of such evidence was not prejudicial.

Instruction No. 20 given on behalf of the People was the instruction submitting to the jury the legal question as to what were the material facts or final essential elements of the crime with which the accused was charged, which instruction has been repeatedly condemned by this court. (*People v. Cramer*, 298 Ill. 509; *People v. Clark*, 301 id. 428.) The giving of this instruction in this case was reversible error.

People's instruction No. 19 was the same unintelligible instruction on reasonable doubt that was condemned in *People v. Jordan*, 292 Ill. 514, and again in *People v. Andrae*, 295 id. 445. The giving of this instruction requires that the judgment be reversed.

People's instruction No. 9 was as follows:

"The court instructs the jury that 'criminal negligence' is an unlawful act done carelessly or negligently or a lawful act done without due caution or circumspection. 'Carelessness' is criminal and within the limits supplies the place of direct criminal intent, and gross carelessness resulting in

injury to others is criminal even if the act done is lawful. The court instructs the jury that if the act was unlawful in itself, a greater degree of care and caution is required to exempt from criminal liability, and as a necessary corollary of this rule it follows that a less degree of negligence is required to make it criminal. The more dangerous the act done the greater degree of care and caution to guard against injury is required."

The language of the instruction is stronger argument against it than pages of reasons why it should not have been given. We will not waste the time nor the space to point out in what respects it is wrong. It is sufficient to say that there is reversible error in every sentence.

The judgment of the criminal court is reversed and the cause is remanded.

Reversed and remanded.

(No. 14519.—Reversed and remanded.)

JACOB KULIK, Appellant, *vs.* JOHN KAPUSTA, Appellee.

Opinion filed April 19, 1922—Rehearing denied June 8, 1922.

1. *DEEDS*—*parol evidence is admissible to show that deed was intended to be a mortgage—burden of proof.* Parol evidence is admissible to show that a deed absolute in form was intended as a mortgage, not only as between the parties and their successors but also as against one who derived his title from the grantee without paying any valuable consideration therefor; but the burden rests upon the one asserting a deed absolute in form to be a mortgage to prove the fact by clear and satisfactory evidence.

2. *SAME*—*what may be considered in determining whether deed was intended as a mortgage.* As a conveyance takes effect from its delivery the question whether it was a deed or a mortgage becomes fixed at that time, but to determine the purpose and intent of the parties the preliminary negotiations leading up to the transaction, as well as the statements of the parties at and after the execution of the instrument, may be admitted in evidence.

3. *SAME*—*deed may be held to be a mortgage although the evidence is conflicting.* Positive evidence of an intention that a deed

absolute in form was, in fact, given as a mortgage is not required, and it is sufficient if the evidence is clear and convincing, even though conflicting.

4. PLEADING—*when bill to have a deed declared a mortgage is prima facie sufficient—Statute of Frauds.* A bill to have a deed absolute in form declared to be a mortgage is not subject to general demurrer where it contains sufficient averments which, if established by parol evidence of the circumstances attending the conveyance, would entitle complainant to the relief prayed, as the Statute of Frauds does not preclude parol proof of the agreement for redemption.

APPEAL from the Circuit Court of Cook county; the Hon. IRA RYNER, Judge, presiding.

CHARLES A. KOEPKE, and JOHN W. ELLIS, (WILLIAM F. STRUCKMANN, of counsel,) for appellant.

BRADLEY, WILLIAMS, KEARNS & FARRELL, (THOMAS E. D. BRADLEY, and EDWARD J. FARRELL, of counsel,) for appellee.

MR. JUSTICE CARTER delivered the opinion of the court:

This was a bill filed in the circuit court of Cook county to recover title to certain improved real estate in Chicago and asking that the court hold a conveyance in the form of a deed to be a mortgage given to secure certain loans. The amended bill was dismissed on demurrer for want of equity, and an appeal was taken from that decretal order to this court.

To the original bill filed in this case a demurrer was sustained, and an amended bill was then filed, to which also a demurrer was sustained. Thereafter leave was granted by the court to file instant another amended bill, to which a general demurrer was filed, and after a hearing the demurrer was sustained, and appellant electing to stand by the bill, the court entered a decree dismissing the bill for want of equity.

The last amended bill stated, in substance, that appellant acquired title to the premises in controversy by warranty

deed in 1916, subject to a mortgage of \$19,000, and executed a second mortgage to secure \$5750, part of the purchase price; that thereafter appellant made extensive alterations and repairs on the premises for which he was unable to pay, with the result that numerous mechanics' lien claims were filed and judgments obtained against him, which became clouds upon the title and prevented him from negotiating new loans thereon; that in November, 1917, he conveyed the premises in trust to Stanley Slomczynski, who at appellant's direction conveyed the same to Agata Kulik, appellant's wife; that Agata Kulik and appellant conveyed the premises in trust to Kazimierz Siedlanka, who in March, 1919, executed a deed in blank, and delivered it, so executed, to appellant; that appellant during 1918, and especially in the early part of 1919, was in poor health and confined to his home and bed for a considerable portion of the time with rheumatism; that appellee, John Kapusta, during the same period was a grocer, a man of means and a close personal friend and neighbor of appellant; that while so confined to his home appellant detailed his financial troubles to appellee and asked him to make a loan sufficient to pay the second mortgage and the lien claims and judgments, and to this end offered to execute notes and secure the same by mortgage on the premises; that appellee informed appellant that he would not make a loan in the usual manner because of the condition of the title and because the amount of money he would be called upon to advance was indefinite, and proposed that he would advance all the money needed if appellant would cause the premises to be conveyed to him, place him in possession and permit him to use the income with which to keep the taxes and first mortgage interest paid, and, so far as the same would permit, apply the remainder in reduction of the advancements to be made for appellant's benefit, and that such advancements by him should be re-paid by appellant within a reasonable time, with interest at seven per cent; that ap-

pellant accepted the offer, and thereupon informed appellee that he had in his possession a deed to the premises executed in blank by Siedlanka, and that he would, and did thereupon, without other or further consideration and with the express agreement that appellee should hold title as security, only, cause to be filled in the deed the name of appellee as grantee; that he thereupon delivered the deed to appellee, who caused it to be recorded and then took possession; that the premises are producing a rental of upwards of \$500 per month, all of which appellee has applied to his own use without accounting therefor to appellant; that notwithstanding the agreement pursuant to which his name was inserted in the deed and he was placed in possession, appellee has failed to satisfy the lien claims and judgments; that the appellee purchased for \$900 the second mortgage, which he agreed to have released but has refused to satisfy and release the same; that after so acquiring title he informed appellant that having entered into no written agreement he intended to hold the title and possession adversely to appellant without paying him anything therefor; that he has from time to time offered appellant small sums for a quit-claim deed and has declined to advance money to pay the liens and judgments or otherwise comply with the agreement; that he has in no way complied with his agreement, and because thereof appellant seeks in equity to have the deed canceled; that the premises have greatly enhanced in value, and appellee now asserts that appellant has parted with all his interest therein and declines to recognize his equities or account to him; that by reason of the foregoing appellant is unable to procure a new loan and satisfy the liens and judgments or make sale of the premises; that he has been so harassed by the judgments since the record of the deed to appellee that he has been compelled to advance large sums of money to pay and satisfy certain of the judgments, and is now being pressed for payment for the unsatisfied liens and judgments. The bill prays that appel-

lee and his wife, Paulina Kapusta, be made defendants and required to answer; that the court decree the deed to Kapusta to be a mortgage given to secure future advances and made without consideration, and that Kapusta be decreed to hold title to the premises in trust for complainant; that the deed to him be decreed to have been procured by fraud and declared to be but a cloud upon the title of complainant to the premises, and that he be ordered and decreed to account to complainant for such sums as may have been advanced by him for the benefit of complainant and for rentals collected from the premises, and be further decreed to pay complainant such sums, if any, as may appear to be due complainant upon such accounting, and that a receiver be appointed, and for further relief, etc.

Counsel for appellant argue that under the allegations of the bill, conceded to be true by the demurrer, the court erred in dismissing the bill, because the deed was executed and acknowledged with the grantee's name left blank and the grantee's name was thereafter inserted long subsequent to the execution and acknowledgment. They also argue, on the facts alleged, that the instrument in question is a mortgage to secure future advances. They further argue that the bill alleges facts showing that the appellee acquired legal title to the land by false and fraudulent promises to hold the same for a certain specified purpose as trustee, and he should be compelled to answer as holding the property in trust for appellant, and that for all these reasons the chancellor erred in sustaining the demurrer to the amended bill and in dismissing the bill for want of equity.

There can be no question, under the authorities, that the allegations of the last amended bill were sufficient to justify the overruling of the demurrer, on the ground that if upon a hearing proof were offered sufficient to sustain the allegations of the bill the deed in question might be held to have been given as a mortgage. Section 12 of chapter 95 of the Revised Statutes provides that every deed convey-

ing real estate which shall appear to have been intended as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage; (2 Hurd's Stat. 1921, p. 2150;) and this court has consistently held since the decision rendered in *Ruckman v. Alwood*, 71 Ill. 155, that parol or extrinsic evidence will be admitted to show that a deed was intended as a mortgage. The decisions also hold that the burden of proof rests upon the one asserting a deed absolute in form to be a mortgage to show that fact by clear and satisfactory proof. (*Deadman v. Yantis*, 230 Ill. 243; *Totten v. Totten*, 294 id. 70; *Rankin v. Rankin*, 216 id. 132.) A conveyance takes effect from its delivery, and the question whether it was a deed or a mortgage becomes fixed at that time. (*Bearss v. Ford*, 108 Ill. 16.) The decision of that question depends upon the intention of the parties at the time of the execution. Parol evidence is admissible to show a conveyance in form absolute or on condition to be a mortgage, not only as between the parties and their successors but also as against one who derived his title from the grantee without paying any valuable consideration therefor. (19 R. C. L. 254.) The inquiry in cases of this class may properly include the facts and circumstances tending to illustrate the purpose and intent of the parties in the transaction. (*Darst v. Murphy*, 119 Ill. 343.) The preliminary negotiations leading up to the transaction, as well as the statements of the parties at and after the execution of the instrument, may be admitted. The court is not restricted to any particular kind of evidence, but may take into consideration almost any pertinent matters which tend to prove the real intention and understanding of the parties and the true nature of the transaction in question. (27 Cyc. 1019.) While there can be no question that the burden of proof rests upon the party asserting that the instrument is, in fact, a mortgage and was so intended by the parties, yet that does not necessarily mean that there

shall be no conflict in the testimony on the question. Positive evidence of the intention is not required. It is sufficient if the evidence is clear and convincing, even though conflicting. 8 Ency. of Evidence, 718; *Totten v. Totten*, *supra*; see, also, the reasoning in L. R. A. 1916B, 46, 47, 235, and cases cited in note.

Counsel for appellee appear to urge that under the Statute of Frauds parol testimony cannot be admitted to show that a deed absolute in form was given as a mortgage. What was said by this court in *Linkemann v. Knepper*, 226 Ill. 473, fully answers this argument, that opinion holding that it was not intended by the adoption of the Statute of Frauds to protect fraud and facilitate its perpetration but to prevent it; that the courts will not permit the statute to be used as an engine of fraud. After laying down the doctrine just stated, the court held that a deed absolute in form, if intended as a security, is in equity but a mortgage, and will be treated and enforced as such even though the agreement for redemption rests only in parol and notwithstanding the Statute of Frauds. Under these authorities, beyond question the allegations of the amended bill in this case showed that the deed in question was executed as a mortgage, and the court on that ground, alone, if for no other, wrongly sustained the demurrer. This being true, it is unnecessary to consider and discuss the question whether or not the deed should be held void because it was executed with the name of the grantee in blank, or the question whether or not the deed was obtained by fraud and deceit on the part of appellee and therefore appellee should be ruled to be holding the property in trust for appellant.

Under the allegations of the amended bill the trial court should overrule the demurrer and require appellee to answer, and the case can then proceed in due course.

The decree of the circuit court is reversed and the cause remanded.

Reversed and remanded.

(No. 14282.—Judgment affirmed.)

THE PEOPLE *ex rel.* Harley Cox, Appellant, *vs.* J. W.
FLING, JR., *et al.* Appellees.

Opinion filed April 19, 1922—Rehearing denied June 7, 1922.

QUO WARRANTO—*judgment dismissing information is presumed to be correct if no bill of exceptions is filed.* The judgment of the circuit court dismissing an information in the nature of *quo warranto*, filed for the purpose of testing the legality of the organization of a community high school district, is presumed to be correct if there is no bill of exceptions in the record. (*People v. Glasgow*, 301 Ill. 394, followed.)

APPEAL from the Circuit Court of Stark county; the Hon. T. N. GREEN, Judge, presiding.

T. W. HOOPES, and F. B. BRIAN, for appellant.

JAMES H. RENNICK, (JOHN W. FLING, JR., *pro se*,) for appellees.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This appeal is prosecuted to review a judgment of the circuit court of Stark county dismissing an information in the nature of *quo warranto* filed in that court for the purpose of testing the legality of the organization of Wyoming Community High School District. There is no bill of exceptions in the record before us, and we are therefore unable to tell for what reason the court entered its judgment dismissing the information. The judgment is therefore presumed to be correct. The condition of the record is the same as that found in *People v. Glasgow*, 301 Ill. 394, and what we said in that case is controlling here.

The judgment of the circuit court is affirmed.

Judgment affirmed.

(No. 14232.—Reversed and remanded.)

JULIA KINCAID SELLERS, Appellee, vs. HARRY O. KINCAID *et al.* Appellants.

Opinion filed April 19, 1922—Rehearing denied June 8, 1922.

1. WILLS—*when decree holding that a will is a forgery will be set aside.* A decree entered on the verdict of a jury finding a will to be a forgery will be set aside by the Supreme Court where it clearly appears from an examination of the original exhibits in the record that the signature to the instrument is genuine, and there is no evidence tending to show any motive on the part of the attesting witnesses to forge the will or to testify falsely as to its genuineness.

2. SAME—*burden is on proponent to prove the will in case of contest.* While the burden of proof, in the sense of producing evidence, passes from party to party as a case progresses, the burden of proof, in the sense of the obligation to establish the truth of the claim by a preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue, and in a suit to contest a will the burden is on the proponent to prove the will.

APPEAL from the Circuit Court of Massac county; the Hon. D. T. HARTWELL, Judge, presiding.

JOHN W. BROWNING, and H. A. EVANS, (FRED R. YOUNG, of counsel,) for appellants.

COURTNEY, HELM & HELM, (S. B. KERR, and J. G. HARLEY, of counsel,) for appellee.

Mr. CHIEF JUSTICE STONE delivered the opinion of the court:

This is a will contest. Appellee, Julia Kincaid Sellers, filed her bill in the circuit court of Massac county contesting the will of Robert E. Kincaid, her brother. By the bill as amended the only ground of contest is that Kincaid did not sign the will,—in other words, that the purported will is a forgery. By the terms of the will the testator, after directing that his debts and funeral expenses be paid, bequeathed to appellee the sum of \$5; to his brother John

\$500; to his brother James \$5; to his nephew, Roy M. Kincaid, son of James, the residue of his personal property, and to Roy and his brother, Harry, he devised all real estate owned by him at the time of his death.

The testator died on March 22, 1919, at the age of about thirty-five years. He had never married. At the time of his death he owned a large amount of land and considerable personal property. His only heirs-at-law were his two brothers, James and John, and his sister, Julia, the appellee. The record shows that the testator was addicted to the excessive use of intoxicating liquor; that in the later years of his life he spent most of his time in the cities of Metropolis, in Massac county, and Paducah, Kentucky, just across the Ohio river; that about July 1, 1918, he was seriously injured in a street car accident in Paducah, resulting in some broken ribs and other injuries; that for a number of weeks thereafter he was disabled by such injuries and for a considerable time walked with a cane. The uncontroverted evidence also shows that by reason of the testator's excessive use of intoxicants appellee and her brother James caused a petition to be filed in the county court of Massac county seeking the appointment of a conservator for him on the ground that he was a drunkard and a spendthrift. He contested this petition, and on a hearing the jury found he was not incapable of managing his own estate and the petition for the appointment of a conservator was denied. He thereafter gave expression to a feeling of bitterness toward his sister and his brother Jim, and also indicated ill-will toward his brother John, who, though he took no part in the conservatorship proceedings, did nothing to assist him in the matter. It is undisputed that Harry and Roy Kincaid, young men about twenty-three and twenty-one years old, were on very friendly terms with the testator and stood by him in his troubles notwithstanding the interest of their father in the matter. Numerous statements were made by the testator in his lifetime

showing an affection for the two young men. The evidence shows that he had stated to different of his friends, at numerous times, that he intended to leave his property to his nephews, Harry and Roy, and that his brothers and sister would get nothing that he was not compelled to give them. It appears that in the spring of 1918 he consulted an attorney in Paducah concerning his right to will his property to his nephews.

The proof of the proponents of the will is, that on July 22, 1918, the testator went to the office of Crossland & Crossland, attorneys at Paducah, and employed them to bring a suit for damages against the Paducah Traction Company for the injuries he had sustained in the street car accident, and that he on that occasion signed a contract stipulating their employment and fee; that at this time Samuel Crossland, the senior member of the firm, was in the office; that later in the same day, some time between four and six o'clock, the testator again appeared at the office of Crossland & Crossland in company with G. A. Chandler, of Paducah, a close friend, who conducted a saloon in that city, and requested the junior member of the firm, C. B. Crossland, who was at that time present, to write his will; that the will was written in accordance with his directions and was witnessed by Crossland and Chandler; that the testator took the will away with him on the day it was executed but some time thereafter brought it back and requested Crossland to keep it for him; that upon learning of the death of the testator, Crossland requested Chandler to notify the nephews that he had the will, as he was not acquainted with them. It appears that one of these nephews secured the will from Crossland and had it probated in the county court of Massac county on the 5th day of May, 1919, and on the 4th day of May, 1920, the bill in this case was filed.

Proponents proved by C. B. Crossland and Chandler, who witnessed the will, that they saw the testator sign it;

that the information concerning the terms of the will was all procured from him. They also proved by Samuel Crossland the execution of the contract made earlier in the day, and it was offered in evidence for the purpose of comparing the signature thereon with that appearing on the will. For this purpose certain checks, notes and other documents were also put in evidence by proponents. The originals of these exhibits, together with like exhibits offered by contestant, have been certified to this court for examination and comparison. Proponents also offered the testimony of sixteen witnesses, neighbors, friends and acquaintances of the testator, who testified as to their acquaintance and business transactions with him, and also as to the signature on the will or to statements of the deceased concerning the disposition of his property, some testifying concerning both matters. In opposition to this, contestant offered the testimony of five witnesses as experts in handwriting, who stated that in their opinion the signature "Robert E. Kincaid" to the will was not in the handwriting of Kincaid. She also offered evidence tending to impeach the reputation of the witnesses Crossland and Chandler for truth and veracity, and offered the testimony of Dr. Miller, a physician in Metropolis, who testified that the testator came to his office in Metropolis at about two o'clock in the afternoon of July 22, 1918, the day on which the will purports to have been executed in Paducah. Dr. Miller testified that Kincaid was under the influence of liquor on that day and very nervous, and that witness gave him a bottle of bromides, and a bottle was introduced in evidence bearing a label dated 7/22/18. Dr. Miller testified that as near as he could remember Kincaid remained at his office until about 3:30, when he went away, saying he was going home. Contestant also offered the evidence of three witnesses who stated that they saw Kincaid on an afternoon in the latter part of July in the city of Metropolis, though they do not state the day of the month; that he was intoxicated and

walking with a cane; that he went to the house where his sister lived when in Metropolis, but that she was not in the city at that time, having moved to Oklahoma and rented the house. These witnesses and two others testified to statements by the testator indicating that he was friendly toward his sister.

In considering whether Robert E. Kincaid signed this will the issues of fact may be divided into four branches or parts: (1) Veracity of the attesting witnesses; (2) possibility of Kincaid being in Paducah on the afternoon of July 22, 1918; (3) attitude of Kincaid toward his sister and brothers; and (4) the signature of Kincaid.

Concerning the first issue, contestant offered George L. Alliston, of Paducah, sheriff; George Dorris, of Paducah, day captain of the police department of that city; Thomas Stevens, a policeman; T. J. Harper, an insurance agent; J. C. Rule, a butcher, and John Mack, a carpenter, who testified that the reputation of C. B. Crossland and August Chandler for truth and veracity was bad. In opposition to this impeaching testimony the proponents offered the testimony of Frank N. Burns, State railway commissioner of Kentucky, former alderman and mayor of Paducah; W. A. Berry, practicing attorney of Paducah; John K. Hendricks, former congressman and State senator from the district of the city of Paducah; James M. Lang, of Paducah, county judge and former president of the board of education and mayor of that city; M. V. Eaton, of Paducah, attorney and former State senator from that district; H. M. Franklin, chief of police of the city of Paducah; Henry Bailey, city tax assessor and former city clerk and chief of police of Paducah; William M. Reed, judge of the circuit court of the second judicial district of Kentucky, and Jack E. Fisher, commonwealth's attorney for such district, all of whom testified that the reputation of C. B. Crossland and Chandler for truth and veracity was good. These witnesses testified to long years of ac-

quaintance with Crossland and Chandler. The record shows that Dorris, one of contestant's witnesses on this branch of the issue, was actively assisting contestant in securing evidence. From an examination of the entire record we are of the opinion that it does not show that Crossland and Chandler are unworthy of belief. If this were the only issue of fact we would not be inclined to disturb the verdict of the jury in this case, however, as they saw and heard the witnesses testify concerning that issue.

As to the second branch of the issue,—*i. e.*, whether or not Kincaid was in Paducah on the afternoon of July 22, 1918,—the testimony of Dr. Miller, for contestant, is that Kincaid was in his office between 2:00 and 3:30 P. M. on that day and that he left about the latter time. Dr. Miller does not attempt to fix the date on which the testator was in his office except by the memorandum on the bottle containing the prescription he gave him at his office. The record shows that the testator owned and operated an automobile. The distance between Metropolis and Paducah is shown to be about ten miles, and the two cities are connected by a roadway. There appears to be no reason why the testimony of Dr. Miller that the testator left his office about 3:30 is not consistent with the testimony of Crossland and Chandler that he was at the office of Crossland & Crossland between four and six on that day. The other witnesses who saw him in Metropolis on an afternoon in the latter part of July, 1918, do not give the day of the month. We are of the opinion, therefore, that the testimony offered by the contestant does not necessarily controvert that offered by the proponents that the testator was in Paducah between four and six on the afternoon of July 22.

Concerning the third branch of the issue,—*i. e.*, his attitude toward his sister and brothers,—proponents offered twelve of the friends and acquaintances of the testator, who testified that Kincaid had made statements of his intention to will his property, or the bulk of it, to his two nephews.

Most of them testified to statements made by him showing ill-will toward his sister and brothers, especially James and appellee. On the other hand, contestant offered the testimony of five witnesses to the effect that Kincaid prior to July, 1918, and subsequent to the conservatorship proceedings, lived with his sister; that their relations were friendly; that on one occasion he went to Oklahoma with her. Five of the twelve witnesses for proponents testified to statements on the part of the deceased a few weeks before the will was made, that he expected to give his property to his nephews, Harry and Roy, and that he would not leave anything to his brothers and sister. Two of the twelve witnesses testified that similar statements were made within a few months of his death. The conservatorship proceedings against him were instituted in February, 1917, so it is evident, if these witnesses are to be believed, that the feeling which these proceedings naturally engendered in him toward those responsible for their being instituted continued to a greater or less degree up to the time of his death.

Coming now to a consideration of the fourth branch of the issue,—*i. e.*, the proof as to the signature to the purported will, upon which appellee chiefly relies in defense of the verdict of the jury,—we find the testimony of five witnesses who qualified as experts stating that the signature to the will is not the signature of Kincaid, while eight of his friends and acquaintances, who testified that they were familiar with his signature, state that the signature to the will is that of Kincaid. The contestant's witness James M. Choat, on being shown a note and an escrow contract proven to have been signed by Kincaid, stated that in his opinion the signatures on those were in the same handwriting as that on the will. The contract which Samuel Crossland identifies as having been signed by Kincaid on July 22, 1918, is in evidence. Its execution and genuineness are not disputed and his signature to that contract must be taken as genuine. Numerous other instruments were offered by

both proponents and contestant for comparison, bearing signatures admittedly those of Kincaid. As these have all been certified for examination on review, this court is not in the same position with reference to them as it is regarding the testimony of witnesses heard before the jury but is in as good a position as was the jury to decide on a matter of comparison.

The evidence in the record shows that Kincaid, on the day the will purports to have been executed, was nervous, doubtless due to his recent injury and to his use of intoxicants. It also shows that he was more nervous at some times than at others. It is also a matter of common knowledge that one recovering from prolonged intoxication is apt to be in a nervous condition. While there is considerable variance in the signatures on the thirty-one instruments offered in evidence by the contestant and the proponents, there are certain noticeable facts concerning them. One is that the contestant's exhibits, with three exceptions, range from a date fifteen months prior to the injury of the deceased to as early as the year 1913. One of the three exceptions is a copy of a purported order for a telephone, dated February 10, 1919, about seven months after his injury and the purported execution of the will. The other two were notes signed by Kincaid, one dated October 26, 1918, and another December 4, 1918, approximately three and four months, respectively, after the date of the will. The exhibits for proponents are, with two exceptions, between April 15, 1918, and July 22, 1918, the date of the will. Of the two exceptions, one, a check, was dated February 13, 1918, and the other, an escrow contract, is dated November 17, 1916. It is evident from an examination of these exhibits, all of which are admittedly signed by Kincaid, that at times his signature was very irregular and showed signs of nervousness, while others were in a smooth, flowing hand. The exhibits offered by contestant are all of the latter type, while those near the date of the pur-

ported will are irregular and indicate a nervousness on the part of the writer. It will be remembered that several witnesses testified to Kincaid's drinking and his nervousness about the date of the will. Proponents' exhibit 3 is a note for \$500, dated July 12, 1918, and signed by Tom Neely, with an indorsement by Kincaid. The evidence shows that this note was executed by Neely on the day it bears date, and that some days thereafter, in order to negotiate the note at the bank, the signature of Kincaid was secured thereto, bringing the date of that signature near to the date of the purported execution of the will. The similarity between that signature and the signature to the will is most marked, as is the lack of similarity between exhibit 3 and most of the signatures of Kincaid put in evidence by contestant. H. W. Hatfield, an expert witness for contestant, admitted on cross-examination that he had accepted exhibit 3 at his bank as bearing the signature of Kincaid. The signature to the contract for services, given to Crossland & Crossland and signed on the same day the will is claimed to have been executed, is likewise of convincing similarity. The signature to the escrow contract, though made in 1916, is very similar to the signature to the will. With the signature to this contract and the signature to the \$500 note, both proven to be genuine, and the signature to the will, before us, a close scrutiny of them forces the conviction that they were all written by the same person.

While this court will not, on controverted questions of fact, overturn the verdict of a jury unless it is satisfied that such verdict is clearly against the weight of the evidence, where we are convinced that such is the case it is the duty of the court to set such verdict aside. (*McGrady v. McGrady*, 298 Ill. 129; *McGovern v. McGovern*, 282 id. 97; *Frederickson v. Carlson*, 267 id. 78; *Hurley v. Caldwell*, 244 id. 448.) In the case of *Bradley v. Palmer*, 193 Ill. 15, it was said: "Manifestly, it was never said by this court, nor intended that it should be understood, that

the court will not interfere with a verdict in a case of this kind [will contest] on the ground that it is clearly against the weight of the evidence, where the evidence is conflicting, unless the evidence of the successful party, standing alone and considered by itself, is insufficient to sustain the decree. * * * The rule * * * is clearly subject to the qualification usually stated in the cases, that the verdict is not clearly against the weight of the evidence."

The contention of the appellants that this is the will of Robert E. Kincaid is also supported by the fact that the will disposes of his property in the manner in which he indicated to numerous friends he would dispose of it. There is nothing in the record tending to indicate any relationship on the part of Crossland to the beneficiaries under this will, from which it might be inferred that they had procured the making of this will. Crossland testified that he did not know either Roy or Harry Kincaid, and this is not disputed. There is no showing of any motive on the part of Crossland or Chandler to forge this will or to testify falsely, and we are of the opinion that on this record the verdict of the jury should be set aside and a new trial awarded.

Appellants also complain of errors in the admission of testimony and in instructions to the jury. We have examined the instructions and the record with reference to the alleged errors in ruling on the admission of testimony and find no reversible error therein. The chief objection of appellants to the instructions offered has to do with the rule as to the burden of proof. This rule is clearly laid down in *Donovan v. St. Joseph's Home*, 295 Ill. 125, where the cases pertaining to the matter have been reviewed. It is there shown that the term "burden of proof" has two distinct meanings; that generally the burden of proof in the sense of producing evidence passes from party to party as the case progresses, while the burden of proof in the sense of the obligation to establish the truth of the claim by a

preponderance of the evidence rests throughout upon the party asserting the affirmative of the issue, and that in the contest of a will the burden of proof is on the proponent to prove the will. There was no reversible error in the giving of the instructions.

For the error herein referred to and discussed the decree must be reversed and the cause remanded.

Reversed and remanded.

(No. 14179.—Appellate Court reversed; municipal court affirmed.)
DAISY M. ROTHWELL, Appellee, vs. JOHN L. TAYLOR, Exr.
Appellant.

Opinion filed April 19, 1922—Rehearing denied June 9, 1922.

1. **APPEALS AND ERRORS**—*Supreme Court may review judgment of Appellate Court on question of law.* Where the judgment of the Appellate Court reversing the trial court in a suit at law is not the result of finding the facts different from the trial court but from holding that the trial court did not correctly apply the law to the facts, the Supreme Court may review the judgment of the Appellate Court on the question of law although the case was tried without a jury and no propositions of law were submitted in the trial court.

2. **GIFTS**—*unindorsed negotiable paper is proper subject of gift.* A negotiable instrument is the subject of a valid gift without indorsement or written assignment by the payee if delivered to the donee by the payee with intent to transfer the title, but the fact of indorsement bears upon the question of intention to make a gift.

3. **SAME**—*possession after death of owner is not sufficient evidence of gift.* Mere possession of property claimed by one as a gift, after the death of the owner, is not sufficient to prove a valid gift.

4. **SAME**—*party claiming property as a gift after death of donor is not competent to testify to circumstances of delivery.* In a replevin suit, the plaintiff, who claims the property as a gift and who was in possession of it after the death of the donor, is not competent to testify to the circumstances of the gift or what the donor said and did.

5. **SAME**—*proof of possession before death of the alleged donor does not make prima facie case of gift—burden of proof.* Proof of possession before the death of the alleged donor by the party claim-

ing the property as a gift is not sufficient to make a *prima facie* case of ownership, but the burden is on the donee to prove the gift by unequivocal and certain evidence. (*Martin v. Martin*, 174 Ill. 371, distinguished.)

6. SAME—*intent to pass title by delivery is essential to gift of chose in action.* To constitute a valid gift *inter vivos* of a chose in action there must be a delivery of the paper with intent to transfer the title.

7. SAME—*when mere proof of delivery does not establish intent to make gift.* Mere proof of delivery may tend to show intent, but where the donee lived with the donor proof of the delivery of unindorsed negotiable paper to the donee can be given but little consideration on the question of intent in a replevin suit after the donor's death.

APPEAL from the Second Branch Appellate Court for the First District;—heard in that court on appeal from the Municipal Court of Chicago; the Hon. JOHN RICHARDSON, Judge, presiding.

WINSTON, STRAWN & SHAW, (JOHN C. SLADE, of counsel,) for appellant.

ELA, GROVER & MARCH, (JUSTIN K. ORVIS, of counsel,) for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

This case comes to this court from the Appellate Court by appeal on a certificate of importance.

Daisy M. Hart, (now Rothwell,) appellee here but who will be hereafter referred to as plaintiff, brought a replevin suit in the municipal court of Chicago against John L. Taylor, (hereafter referred to as defendant,) individually and as executor of the will of Elizabeth Condell, deceased, to recover two promissory notes for \$1300 and \$300, respectively, and two certificates of deposit of money in a bank, one for \$465, the other for \$100. These notes and certificates were payable to Elizabeth Condell and were never indorsed by her. After her death defendant learned they

were in possession of plaintiff and demanded them as assets of the estate. She refused to give them up. Subsequently she placed them in the hands of her lawyer, with instructions not to deliver them to defendant without an order of court. Afterwards the lawyer did give them to defendant without any order of court and took a receipt from defendant stating that they were delivered to him but that such delivery was made under protest and without prejudice to plaintiff's rights.

Elizabeth Condell lived in Libertyville, Illinois, and died there August 26, 1917. She had lived alone until some time before her death, when plaintiff, who was her niece and a nurse, went to her house and stayed with and took care of her till she died. Deceased was a maiden lady, seventy-two years old. Benjamin Miller, an attorney, testified he prepared a will for her which was executed July 4, 1917, by which, after providing for the payment of her debts and funeral expenses and the erection of a monument not to cost to exceed \$200, she devised all the residue of her property to Miller, Taylor (defendant) and Eaton, as trustees, for the establishment of a hospital in Libertyville. Miller testified that about the first of August plaintiff called on him and told him her aunt desired to see him as early as convenient. He went to see her and she told him she wanted to change her will; that she wanted to give plaintiff the house and lot where she lived. He prepared another will giving the house, lot and furniture to plaintiff, and the residue of the testatrix's property was disposed of the same as in the will of July 4. Miller testified he feared plaintiff's influence had caused Miss Condell to make the change in her will, and when the last will was executed he inquired of her where she wanted the will kept and where she kept her papers and securities. Miss Condell requested him to keep possession of the will and told him she had her papers in her house in a bureau drawer. Miller, who is named as one of the trustees in the will, appears to have been

very solicitous that the notes and certificates should pass to the hospital under the will and said he feared plaintiff might influence her aunt to dispose of them otherwise. He inquired if she thought that was a safe place to keep them, and Miss Condell told him to go to the bureau drawer and take out of a package an \$18,000 mortgage and keep it with the will. In the same envelope were the notes and certificates of deposit here in controversy. Miller asked what she wanted done with them, and she told him to leave them there; that she might want to get money on them, and that she could do that if she wanted to. They were left in the bureau drawer.

It is not denied that plaintiff was in possession of the notes and certificates before and at the time of Miss Condell's death, but they were never indorsed by Miss Condell. Plaintiff claimed her aunt made a gift of them to her and delivered them to her possession before her death. After incompetent evidence, heard subject to objection, was stricken out, the proof of a gift to plaintiff by her aunt is plaintiff's claim of ownership and possession of the notes and certificates before Miss Condell's death. There was no proof that plaintiff's possession of the notes and certificates was not acquired pursuant to a gift by her aunt. If they were a gift to plaintiff, indorsement was not essential to pass the title but it would have been important in establishing a gift. The question then presented to the trial court for decision was, whether plaintiff's claim of ownership and possession of the unindorsed securities before the death of her aunt was sufficient proof of her title and ownership to authorize a judgment in her favor against defendant for their value. The trial court held that proof was insufficient and rendered judgment for the defendant. The plaintiff prosecuted an appeal to the Appellate Court for the First District, and that court reversed the judgment and entered judgment there for plaintiff for the face value of the notes and certificates. The Appellate Court's judgment

was not the result of finding the facts different from the trial court but from holding the trial court did not correctly apply the law to the facts; that the facts proved on the trial as a matter of law entitled plaintiff to judgment.

One of defendant's contentions here is that a jury having been waived in the trial court and no propositions of law having been submitted no question of law was preserved for review by the Appellate Court, and for that reason the Appellate Court erred in reversing the judgment of the trial court. Counsel now say when the briefs were written the decisions of the Appellate Court for the First District were conflicting on that question, but it is now admitted that the question was settled contrary to defendant's contention in *Pittsburgh, Cincinnati, Chicago and St. Louis Railway Co. v. Chicago City Railway Co.* 300 Ill. 162. Counsel for plaintiff say no propositions of law were necessary; that the question for determination in the Appellate Court was one of fact, and the decision of that court on questions of fact is conclusive, and for that reason there is nothing for this court to pass on. We have seen this is a misapprehension. (*Sellers v. Thomas*, 185 Ill. 384.) Neither side now claims this court has not the power and right to review the judgment of the Appellate Court on questions of law.

It is now well settled by all the authorities that negotiable instruments are subjects of a valid gift without indorsement or written assignment by the payee, if delivered to the donee by the payee with intent to transfer the title. The burden of proof of the gift is on the donee to prove all facts essential to a valid gift. The essential facts are the delivery of property by the donor to the donee with intent to pass the title, and the great weight of authority is that the proof to sustain the gift must be clear and convincing. (*Maxler v. Hawk*, 233 Pa. St. 316; *In re Bolin*, 136 N. Y. 177; *Grey v. Grey*, 47 id. 552; *Chambers v. McCreery*, 106 Fed. 364; 45 C. C. A. 322.) Mere possession by one

claiming property as a gift, after death of the owner, is universally, we believe, held insufficient to prove a valid gift. The competent proof here shows plaintiff had possession of the notes and certificates a short time before her aunt's death and claimed title by gift. She was not competent to testify to the circumstances of the gift or what her aunt said and did, and there was no testimony on that question. The only facts proved show plaintiff had possession of the notes and certificates before Miss Condell's death and claimed to own them. This presents the question whether the proof met the requirements of the law as to what is necessary to pass title in such cases.

Plaintiff contends that the undisputed proof of her possession of the property before her aunt's death makes a *prima facie* case of her ownership, which defendant failed to overcome by contrary proof. In support of this contention great reliance is placed on *Martin v. Martin*, 174 Ill. 371. That case sustained a gift of unindorsed negotiable paper in litigation which arose after the death of the donor between his executors and the donee. Aside from the fact that the donee was in possession and claimed the property before the death of the donor there was other testimony tending to show the donor delivered the notes to the donee some time before his death with intent to pass title. The court made some observations on the presumption of title from possession and the effect that should be given to it, but it was evidently not intended to lay down a rule of law different from that found in other decisions of this court and the courts of other States generally. The decision of the case was correct, for other proof than possession of the donee warranted the conclusion that the donor delivered the notes to the donee with intent to pass the title thereby. In *Millard v. Millard*, 221 Ill. 86, a mother, after the death of her son, claimed title to certain money and securities as a gift from him. She obtained the possession before her son's death. This court held the burden was on the donee

to prove the gift by evidence not equivocal or uncertain, and said: "It was essential to prove that there was an intention on the part of the deceased to transfer the title and right of possession of the property to Jane H. Millard and that there was a delivery of the subject matter of the gift by which he parted with all control over it." That is the universally recognized rule by courts and text writers, we believe. See, also, *Barnum v. Reed*, 136 Ill. 388.

To constitute a valid gift *inter vivos* of a chose in action there must be a delivery of the paper with intent to transfer the title. (12 R. C. L. sec. 18, p. 941.) Mere proof of delivery may be some evidence tending to show intent, but under the circumstances shown in this case all the authorities are that but little consideration can be given to it. Let us assume that because plaintiff had possession of the notes and certificates before her aunt's death it must be presumed, unless the contrary is shown, that her aunt delivered them to her. Would the presumption also follow, as a matter of law, that the delivery was with intent to pass title? The intent to pass title by delivery is an essential element of a valid gift. Here the delivery is claimed to have been made a few days before Miss Condell's death. Must it be presumed such delivery was made with intent to pass title to plaintiff and for no other purpose? There is no proof whatever of the intent with which the delivery was made, and we find no case, under circumstances similar to those of this case, where the intent will be inferred from the fact, alone, of delivery. (14 Am. & Eng. Ency. of Law, 1050-51.)

The Appellate Court erred in rendering judgment for plaintiff. Its judgment is reversed and the judgment of the municipal court affirmed.

Judgment of Appellate Court reversed.

Judgment of municipal court affirmed.

(No. 14458.—Judgment affirmed as to Sponagel.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. RAY J. MARTIN and CLARENCE SPONAGEL, Plaintiffs in Error.

*Opinion filed April 19, 1922—Rehearing as to Martin allowed
June 8, 1922.*

1. CRIMINAL LAW—*reasonable doubt is not raised merely because testimony is conflicting.* While the evidence, in order to justify a conviction, must be sufficient to remove all reasonable doubt and create an abiding conviction of the defendant's guilt, yet a well founded and reasonable doubt is not necessarily raised because the testimony is conflicting, and it is the province of the jury to weigh the evidence and determine the credibility of the witnesses.

2. SAME—*proof of alibi must be sufficient to raise a reasonable doubt.* The question of alibi is one of fact, and proof of that defense must be of such a character as, considered in connection with all the other evidence, is sufficient to create in the minds of the jury a reasonable doubt of the defendant's guilt.

3. SAME—*Parole act is valid.* The Parole act, providing for indeterminate sentences, is not unconstitutional. (*People v. Doras*, 290 Ill. 188, and *People v. O'Donnell*, 291 id. 178, followed.)

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. JOSEPH H. FITCH, Judge, presiding.

LEWIS A. HAUSCHILD, (THOMAS E. SWANSON, of counsel,) for plaintiff in error Ray J. Martin.

ELWYN E. LONG, for plaintiff in error C. Sponagel.

EDWARD J. BRUNDAGE, Attorney General, ROBERT E. CROWE, State's Attorney, and EDWARD C. FITCH, (EDWARD E. WILSON, and CLYDE C. FISHER, of counsel,) for the People.

Per CURIAM: Ray J. Martin and Clarence Sponagel (hereafter called defendants) were convicted of robbing Elof Lindberg of his automobile, watch and chain and overcoat in Chicago the night of May 14, 1921. Both

were sentenced to an indeterminate term in the penitentiary and have sued out this writ of error to review the judgment.

Lindberg was driving home in his car about 10:30 o'clock the night of May 14, 1921. He drove on Robey street, and after passing the corner of Berwyn street he turned west on that street. He testified he noticed a man standing at the southeast corner of Robey and Berwyn streets and thought he recognized him as an acquaintance and came near saying good evening as he passed him. The witness drove on to the grocery store of Carl Allen, an acquaintance, got out of his car and went in the store. The two men, Lindberg and Allen, came out of the store and got in the car and started to drive away when two men came up to the car, one on each side, and climbed into the back seat of the car. After they got in Allen jumped out. One of the men in the rear seat put a gun against Lindberg, commanded him to put his hands up, and inquired if he wanted to get shot. Lindberg did not see the man who said that because he was afraid to look back. The men told him to drive south, and when he had driven about one hundred feet they ordered him to stop and pick up another man, who came from the southeast corner of Robey and Berwyn streets. That man was Sponagel. He got in the front seat by the side of Lindberg, held a gun against his side and told him to keep on driving down Robey street. A man in the rear asked witness where his dough was, and he replied he had nothing. They went through his pockets, took his watch and chain, his overcoat and a lot of papers. At Sponagel's command he drove down Robey street to Ainslie street and turned west on that street. Sponagel said he would drive, and took the wheel. When they reached Oakley street Sponagel said, "Let's take him down an alley and look him over," but they did not do it. They told him to get out of the car. He did so and they drove off with it. The car was worth \$650, the overcoat \$30 and the watch and chain \$50. Witness next saw his car May 16 at the

Hyde Park police station, his overcoat at the Chicago Avenue police station, and parts of his watch chain at the same places. He never saw his watch again. Lindberg testified that when he saw the two men who got in the rear of his car come out of the doorway the man on the right-hand side had on a light top-coat and a cap; that when they made a rush for the car he suspected a hold-up, took his pocket-book out of his pocket and dropped it on the car floor and kept his feet on it; that when they told him to get out of the car he pushed the pocket-book out and stepped on it. He was made to hold up his hands and two guns were pointed at him from the rear seat.

Allen testified he got in the car with Lindberg and just as it started two men came out of the vestibule of a house next to the store. They came to the car and one of them said to them, "What is your hurry?" and as Lindberg turned the machine around they came up to the car, one on each side, jumped on the running-board and climbed in the rear. One of them held a gun behind witness' shoulder and said, "Don't be flirting with the undertaker." Witness had about \$600 in his pocket. He jumped out of the car and ran north. The car was going south.

George Carlson testified he and his wife were walking on Robey street just north of Berwyn at the time the hold-up occurred. They saw two men in the vestibule of an apartment building just north of Berwyn. The vestibule was lighted up. The men appeared to be peeping north at the Carlsons, who were walking south. His wife remarked about them. Witness said he got a good look at them. After he had passed the two men he heard a car start up, turned around and saw two men come out of the doorway he had passed and get in the car. The car turned around, and as it did so he saw Allen jump out of it. Witness saw a big, heavy-set man, whom he identified as Sponagel, standing near the corner of Berwyn and Robey streets looking at the automobile. As it came south

he came out in the street in front of it, pulled a gun, waved it in the air and the car stopped. He got in the car and it drove on south. Mrs. Carlson testified to substantially the same facts. She identified Sponagel as the man who ran out in front of the automobile, waved a revolver in the air and got in the car. She saw Allen get out of the car and run away. She and her husband afterwards saw Sponagel at the county jail.

Alfred Schutz, a police officer, testified that he went to Sponagel's house, 1324 North Clark street, at 7:15 P. M., May 15, and arrested him. Sponagel ran out of the rear of the house into the alley. The officer followed him and called to him to halt, and Sponagel reached back to his hip pocket, threw a pistol in the air and the officer arrested him. He searched the house, found an overcoat, which he produced and Lindberg identified as his, and found a gun in the pocket. The overcoat was hanging on a bed in Sponagel's room.

On behalf of Sponagel, John Maynard testified that he was employed by the Consumers Ice Company. He knew Sponagel, and on the 14th day of May was at his house, 1324 North Clark street, about nine o'clock in the evening. He went to employ Sponagel to drive an ice wagon. They remained at Sponagel's house about twenty minutes, then went to State street and Grand avenue to a pool room. John Callahan was with them. Witness left Sponagel at the pool room. He testified he knew Sponagel's general reputation for honesty and integrity in the neighborhood where he lived prior to the indictment and that it was good. The witness lived at 26 East Twenty-third street and Sponagel lived at 1324 North Clark street. He testified they were at the pool room till about eleven o'clock. Sponagel agreed to go to work at the job witness wanted him for, on Monday morning, but did not do so.

Sponagel testified in his own behalf and denied he was at the place where the hold-up occurred or that he knew

anything about it. He testified he was home with his wife May 14 and about 9:00 or 9:30 Callahan and Maynard came in and Maynard wanted to employ him to work for his company. They went together to the pool room and played about two hours, and it was after twelve o'clock when he left the pool room. After he got home Ellis and Ford, one or both of whom were rooming at his house, came in and wanted Sponagel to go for a ride with them. They stayed ten or fifteen minutes. Ford went out and came back with a couple of automobile robes, a tire and an overcoat. He said it was too warm for the coat and he would leave it there. The first time he knew he was charged with robbery was the last of July or first of August.

John Callahan testified he went to Sponagel's house the evening of May 14 with Maynard. He went to the pool room with them and remained there till about eleven o'clock, when he went home. He testified he knew Sponagel's general reputation in the neighborhood where he lived for honesty and integrity, and so far as he knew it was good prior to May 14.

The foregoing is the substance of the material testimony as to Sponagel on both sides. He contends that his guilt was not proven beyond a reasonable doubt, that the court erred in refusing and in modifying instructions, and that the State's attorney in his argument indulged in inflammatory statements which were highly prejudicial. It is argued that he proved he was not at the place of the crime at the time it was committed but was elsewhere, and this is sufficient to at least raise a reasonable doubt of his guilt. It is not surprising that the jury gave little credit to the alibi of Sponagel. Lindberg positively identified him as the man who got in the seat with him and held a gun to his side while he was driving the car and later took the wheel and drove himself. He was also identified by Mr. and Mrs. Carlson. His conduct at the time of his arrest and his explanation of how Lindberg's overcoat came to be in his

house were not calculated to impress the jury with the credibility of his defense. The question of alibi is one of fact, and proof of that defense must be of such a character as, considered in connection with all the other evidence, is sufficient to create a reasonable doubt in the minds of the jury of defendant's guilt. (*Ackerson v. People*, 124 Ill. 563; *Hauser v. People*, 210 id. 253; *People v. Scott*, 261 id. 165.) Because the testimony is conflicting does not necessarily raise a well founded and reasonable doubt. It is very seldom there is no conflict in the testimony of the respective sides, and there would rarely be a conviction in a criminal case if a defendant's guilt could only be established by uncontradicted testimony. We would not be justified in reversing the judgment as to Sponagel on the ground that the evidence was insufficient.

It is contended the court erred in modifying, and giving as modified, defendants' twentieth instruction. The part of that instruction given was as follows:

"The court instructs the jury that where a person on trial for a crime shows that he was in another place at the time when the act was committed, he is said to prove an alibi. One of the defenses interposed by the defendants in this case is what is known as an alibi, that is, that the defendants were at another place at the time of the commission of the crime. The court instructs the jury that such a defense is as proper and legitimate, if proved, as any other, and all the evidence bearing on that point should be carefully considered by the jury. If in view of all the evidence the jury have a reasonable doubt as to whether either of the defendants was not present but was in some other place, when the crime was committed, they should give such defendant or defendants, the benefit of the doubt and find him or them not guilty. As regards the defense of an alibi, the jury are instructed that the defendants are not required to prove that defense beyond a reasonable doubt to entitle them to an acquittal. It is sufficient if the evi-

dence upon that point raises a reasonable doubt of their presence at the time and place of the commission of the crime charged."

The remainder of the instruction, which the court refused to give, was practically a repetition of what was given, but it is claimed it should have been given because the part refused ended by telling the jury that if they entertained a reasonable doubt as to the guilt of defendants, or either of them, they should find them not guilty, although the jury might not be able to find the alibi was fully proved. Complaint is made of one other instruction refused, but we are of opinion that no error was committed by the court in modifying or refusing instructions.

In his argument to the jury the State's attorney referred to men going out with murder in their hearts, carrying concealed weapons, in order to commit robbery, and said if somebody makes a false step there is liable to be murder. He said men had a right to travel the streets of Chicago; that Carlson, Allen and Lindberg had a right to travel the streets. He also mentioned jurors Hart and Kavanagh as having such right, and that all the men in the court room had that right, in day time or night. Defendants' counsel objected that he was mentioning jurors by name, and the court ruled that was not proper. In his argument the State's attorney referred to something that happened May 27. He did not say what it was nor mention the names of any parties. The court ruled it was improper to make reference to anything that might have happened May 27. The court's ruling was correct, and no further objection was made to the argument of the State's attorney. We do not see how anything he said could have prejudiced defendants with the jury.

Counsel for Sponagel contends what is known as the Parole statute is unconstitutional. This question has been decided contrary to that contention in *People v. Doras*, 290 Ill. 188, *People v. O'Donnell*, 291 id. 178, and other cases.

An opinion was filed at the April term, 1922, affirming the judgment as to both plaintiffs in error. A petition for rehearing has been presented on behalf of Martin, and as to him we are of the opinion the case should receive further consideration. For this purpose his petition for rehearing is allowed, and the opinion filed at the April term has been modified so as to limit the affirmance of the judgment to the conviction of Sponagel.

The judgment is affirmed as to Sponagel and a rehearing is allowed as to Martin.

Affirmed as to Sponagel.

Rehearing allowed as to Martin.

(No. 14525.—Reversed and remanded.)

FORREST DEEM, Appellant, vs. CHARLES C. MILLER *et al.*
Appellees.

Opinion filed April 19, 1922—Rehearing denied June 8, 1922.

1. WILLS—*when interests of after-born children cannot be destroyed by conveyance.* Where a will creates a life estate with a remainder to the children of the life tenant, the life tenant and the living children cannot, by making a conveyance, destroy the interests of after-born children, as the remainder is vested in quality although contingent in quantity; and there is no provision in the law for the protection of such interests in the fund arising from such conveyance as there is in case of partition or a judicial sale.

2. DEEDS—*covenant to convey by a good warranty deed means a good title—pleading.* A covenant in a contract for conveyance to convey a fee simple title "by a good and sufficient warranty deed" requires conveyance of a good title in law, which means a good merchantable title, and a declaration for damages alleging a breach of the contract because the defendant could not convey a "good title" is in accordance with the terms of the contract and is sufficient.

APPEAL from the Circuit Court of Henry county; the
Hon. EMERY C. GRAVES, Judge, presiding.

THOMAS J. WELCH, for appellant.

ALBERT E. BERGLAND, and STURTZ & EWAN, (JOHN T. CUMMINGS, of counsel,) for appellees.

Mr. CHIEF JUSTICE STONE delivered the opinion of the court:

This is an appeal from a judgment in bar against appellant, entered by the circuit court of Henry county. Appellant and appellees, Charles C. Miller and his four children, all adults, entered into an agreement on the 17th day of May, 1919, whereby appellant agreed to purchase from appellees certain lands in the county of Henry and State of Illinois, and appellees agreed to convey the same "in fee simple, clear of all incumbrances whatsoever, by a good and sufficient warranty deed," abstract to be furnished by appellees. The consideration for the purchase was the sum of \$32,000, of which \$500 was paid at the time of the signing and delivery of the contract, the contract to be completed March 1, 1920, and possession given at that time. The contract provided that in case appellant failed to make either of the payments or perform any of the covenants on his part to be performed, the contract should, at the option of appellees, be forfeited and determined and appellant forfeit all payments made by him on such contract as liquidated damages, and appellees should thereupon have the right to re-enter and take possession of the premises. It was also agreed that time of payment was to be of the essence of said contract. The appellees acquired whatever interest they had in the premises in question by reason of paragraph 3 of the last will and testament of Harriet Miller, deceased, which is as follows: "I give and bequeath to my son, Charles Miller, the following tract of land, [describing the same,] to have and enjoy the use thereof dur-

ing his natural life, but he shall have no right, power or authority to sell, incumber or convey the same or any part thereof nor any interest therein, and upon his death said real estate shall be divided in equal parts among his children." Appellees tendered a conveyance to appellant of the title as shown by their abstract, which was refused by appellant on the ground that it was not the title contracted for. Appellant thereafter brought this action in assumpsit to recover damages for breach of the contract. The declaration consists of two counts. The first avers the making of the contract, and that appellant was ready, willing and able to comply with all its terms on March 1, 1920, but that appellees did not make or cause to be made to appellant a good title to said lands, and that appellant lost thereby the benefit of the purchase, alleging damages in the sum of \$3500. The second count is similar to the first, except that it avers that appellees did not have a fee simple title, clear of all incumbrances, to the lands on the date of the contract or at any time since then; that the interest of appellees in said lands was acquired by the foregoing provision of the last will and testament of Harriet Miller, and that by reason of the fact that Charles C. Miller is still living, it is impossible for appellees, under the law, to convey to appellant a fee simple title to said lands, clear of all incumbrances whatsoever. A general and special demurrer was filed to this declaration and sustained and judgment in bar entered by the court.

It is contended by appellant that the declaration sets out a good cause of action against appellees, and that appellant ought to recover for the reason that it is impossible for appellees to convey to appellant the title which they contracted to convey. It is contended by appellees that a conveyance by the life tenant and such of his children as are *in esse* passes good title to the lands in question; that appellant has refused to accept such title, and that therefore there is no breach of the contract.

The theory of appellant is that the children of the life tenant have a vested estate subject to being opened up to admit after-born children, and that the rights and interests of after-born children will not be destroyed by the conveyance of the life estate and the interests of such children *in esse* tendered in this case, but that such after-born children, if there be such, will have an interest in the lands in question. Appellees' theory is, that while the rule is as announced in *Field v. Peeples*, 180 Ill. 376, and other cases, that where a remainder is limited to a class, some of whom are not in existence, such remainder vests in those *in esse* subject to being opened up to let in after-born children born during the continuance of the life estate, yet such rule means that if the life estate come to an end by conveyance of the life tenant or otherwise, children born after such conveyance are not born during the continuance of the life estate, and that a deed made by the life tenant and the remainder-men *in esse* cuts off the right of any after-born children.

In *Weberpals v. Jenny*, 300 Ill. 145, the question arose on a bill for specific performance of a contract for the sale of land. The defense was that the abstract offered by the vendor did not show merchantable title. Whether or not it did depended upon the construction of the sixth clause of the will of David Sholes, which gave a life estate to his daughter in the lands involved and upon her death to her children, to be divided among them equally. It was there held that the interests of after-born children, when they came into being, were identical with the interests of the living children of the life tenant. While it was there urged that the after-born children by reason of the conveyance would have no interest whatever in the lands, it was held that such was not the rule in contracts for the sale of land, though in cases of partition a court of equity would, in a decree for partition and sale, designate the interests of

remainder-men not *in esse* and protect such interests in the fund.

In *Gibbs v. Andrews*, 299 Ill. 510, the testatrix devised land to her daughters for life with remainder in fee simple to the heirs of their bodies. It was there held that the remainder in the share devised to each daughter was vested in the children *in esse* of such daughter, subject to being opened up to let in after-born children, diminishing the interests of those *in esse* at the time of the devise.

In *Dustin v. Brown*, 297 Ill. 499, it is held that where a life estate is given with remainder to the children of the life tenant the remainder vests in such children subject to being opened up to let in after-born children, but that the quantum of the interest in the remainder held by the children *in esse* is undetermined.

In *Richardson v. VanGundy*, 271 Ill. 476, the deed was to the life tenant for life and at her death to the heirs of her body. It was there held that the deed conveyed to Laura VanGundy a life estate with remainder in fee simple absolute to her children, which remainder vested in the four children, subject to being opened up to let in the shares of children afterward born. It was also held that the estate was vested in quality in these children, but it was contingent in quantity and must remain uncertain in that respect until the death of the life tenant.

We find no authority for the contention that the rule as to the destruction of contingent remainders should be applied to a case where the estate is vested in quality but contingent in quantity. There is no outstanding contingent remainder in this case. The remainder is vested in the children of the life tenant who are *in esse*, and their interest is subject only to a contingency affecting the quantum of their interest but not the quality of the estate taken by them.

In cases of partition such as have been herein referred to, equity, in order to enforce the right of partition, will dispose of the interests of after-born children in

the remainder in the property, provided adequate protection of such interests is made in the fund. This is done because of the equitable right to partition and because the rights of after-born children, should such arise, are adequately protected in the fund and their rights are by representation passed upon. In *Dole v. Shaw*, 282 Ill. 642, Charles T. McCumber took the land in question by deed from his father granting him a life estate with remainder to his children. On a petition in the county court setting out that it was for the best interest of the children of McCumber that their remainder, together with McCumber's life estate, be sold, the land was sold at guardian's sale, and the question arose as to whether or not this sale extinguished the rights of after-born children of McCumber. The proceedings, including the decree, took no notice of the rights of after-born children, and it was there held that in the absence of a provision protecting the interests of such children in the fund into which the land was converted, such sale did not divest them of their interests in the land itself should there be after-born children, it there being held that the rights of persons unborn are sufficiently cared for where the estate is sold under a regular and valid judgment and the interests of such after-born children are protected in the proceeds from such sale. It has also been held that a trustee under a will may sell the interests of after-born children where all living persons in interest are made parties and where the proceeds are impressed with the interests of after-born children so that the same may be protected. In such case children not *in esse* have been held to be fully represented and their rights fully defended and protected by those in being, whose rights are identical with those of the after-born children. (*Hale v. Hale*, 146 Ill. 227; *Fienhold v. Babcock*, 275 id. 282.) We are not advised, however, of any case where the interests of after-born children have been extinguished by contract or conveyance by the life tenant and remainder-men *in esse* even by attempting

to protect the same in the fund, and, indeed, there appears to be no good reason for such a rule. The right of a life tenant or remainder-man to convey in such a case is subject to and does not dominate the interests of after-born children, and such life tenant or remainder-man cannot exercise control over the same, as a court of equity may be said to do in the enforcement of an equitable right of partition or in case of a sale under a judgment of court.

We are of the opinion that under the will of Harriet Miller a deed from the life tenant, Charles Miller, and his children *in esse*, will not extinguish the rights of unborn children of Miller, and that a transfer of the property can not be made conferring a good merchantable title. It follows that the title contracted for was not tendered, and the declaration of appellant in this case was not subject to demurrer for that reason.

It is urged by appellees that the circuit court was right in sustaining the demurrer filed to the declaration in this case, for the reason that the averments of the breach were not in accordance with the terms of the contract. The contract provided that appellees should convey to appellant "in fee simple, clear of all incumbrances whatsoever, by a good and sufficient warranty deed." The declaration alleges that they did not tender a good title. The covenant to convey in the language used in this contract requires conveyance of a good title in law, which means a good merchantable title. (*Brown v. Cannon*, 5 Gilm. 174; *Geithman v. Eichler*, 265 Ill. 579.) The allegations of the declaration are sufficient in that regard.

For error in sustaining the demurrer of appellees the judgment is reversed and the cause remanded to the circuit court, with directions to overrule the demurrer.

Reversed and remanded, with directions.

(No. 14529.—Reversed and remanded.)

THE CITY OF CARLINVILLE, Appellee, vs. W. E. P. ANDERSON *et al.* Appellants.

Opinion filed April 19, 1922—Rehearing denied June 8, 1922.

1. SPECIAL TAXATION—*when court may permit plats to be attached to copy of ordinance.* In a proceeding for the confirmation of a special tax for a local improvement, where a copy of the ordinance is filed in the county court with the plats and profiles enclosed with it inside of a rubber band, the court, on objection that said plats and profiles were not attached to the ordinance, may permit them to be actually fastened to the copy.

2. SAME—*what items must be paid for out of the general fund.* The cost of inspecting work and materials, engineering during the construction of the improvement, and the expense of executing the contract, which means requiring the contract to be performed according to its terms, must be paid by the city out of its general fund or be included within the six percentum allowed to be levied by certain cities under the proviso to section 94 of the Local Improvement act.

3. SAME—*evidence to show necessity of paving is not admissible in confirmation proceeding.* In a proceeding to confirm a special tax for paving a street, evidence as to the muddy condition of the street is not admissible to show the necessity of paving, as that matter is determined by the city council, but such evidence, properly limited, is competent on the question of benefits which will result from paving.

4. SAME—*burden is on petitioner in proceeding to confirm special tax.* In a proceeding to confirm a special tax the petitioner must prove both the legality and the justice of the charge, notwithstanding the provision of section 49 of the Local Improvement act that the assessment roll shall be *prima facie* evidence of the correctness of the assessment, as such provision does not cast the burden of proof on the objector, and on the trial the assessment roll is not evidence of anything.

5. SAME—*what instruction is not applicable to hearing to confirm special tax.* On a hearing of objections to the confirmation of a special tax the only question for the jury is whether the benefit is equal to the tax, and they should not be encouraged to make such finding by an instruction that under the law if the actual cost does not equal the tax the property owners will be entitled to a deduction or re-payment by the city.

6. SAME—*what instruction is improper in proceeding to confirm special tax.* In a proceeding to confirm a special tax it is not proper to give an instruction telling the jury that if they find that the benefits are as much as or more than the tax their work will be done but if they decide in the negative they must further determine the amount the several pieces of property are benefited.

7. SAME—*county court cannot order deficiency to be taxed as public benefits.* In a proceeding for a local improvement by a special tax the question whether the public shall pay any part as public benefits is for the city council, alone, and the county court, in the proceeding to confirm the assessment of the tax on private property, cannot order to be taxed against the city as public benefits a deficiency caused by reductions of particular assessments.

8. EVIDENCE—*effect of legislative provision making the determination of a fact prima facie evidence thereof.* The burden of proof remains with the party having the affirmative of a proposition until a final determination thereof, and a legislative provision that the finding of an administrative authority charged with the duty of determining a fact shall be *prima facie* evidence of the fact, means only that such determination shall be sufficient to justify a finding of the existence of the fact in the absence of any evidence to the contrary.

APPEAL from the County Court of Macoupin county;
the Hon. ANDREW J. DUGGAN, Judge, presiding.

MURPHY & HEMPHILL, and JESSE PEEBLES, for appellants.

T. K. RINAKER, City Attorney, and THOMAS RINAKER, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

This appeal is prosecuted by eleven property owners from a judgment of the county court of Macoupin county confirming a special tax against their respective pieces of property.

The ordinance provided for paving Charles street, a distance of one mile, with a brick pavement twenty-three feet wide, with a concrete curb and gutter on each side,

and the entire cost was ordained to be paid by special taxation of abutting property. The estimated cost of the improvement was \$80,722.68. On application for confirmation of the tax the appellants interposed legal objections, which were overruled, and there was a trial by jury upon the objection that the parcels of property owned by the appellants were taxed more than they would be benefited by the improvement. Separate verdicts as to the several parcels of property were returned, finding in each instance that the property would be benefited in an amount equal to or more than the special tax, except as to property of the appellant Albert Mueller, where a reduction was made.

One objection to the ordinance was that it was invalid because the plats and profiles of the contemplated work were not attached to it at the time it was adopted by the city council nor when the same was filed in the county court. There was no evidence in support of the objection that the plats and profiles were not attached to the ordinance when passed, and that objection was not sustained. When a copy of the ordinance was filed in the county court, plats and profiles were enclosed with it inside of a rubber band, and on the objection being made the court permitted them to be actually fastened to the copy. They were already substantially attached by means of the rubber band, and there was no error in the ruling of the court.

Another legal objection was that five per cent of the estimate of the cost of the improvement, amounting to \$3626.35, was included in the special tax charged against the property for inspection and engineering during the construction of the improvement. This objection should have been sustained. The Local Improvement act (Harker's Stat. 757,) provides in section 94 that the costs and expenses of maintaining the board of local improvements, including salaries of the members, and other items therein specified, shall be paid by the city, village or town out of its general fund, with a proviso that in cities with a popu-

lation of less than 100,000 a certain sum not exceeding six percentum of the amount of the assessment may be applied to the payment of the specified expenses and other costs of making and collecting the assessment. Among the items enumerated in section 94 to be paid out of the general fund unless covered by the six percentum is the expense of letting and executing contracts. There is some expense in letting contracts but none whatever in signing one. As there is no possible expense of that kind the statute can only be given the meaning of performance of contracts. The natural meaning of the execution of a contract is its completion according to its terms. The duty of inspection and requiring such performance is imposed on the board and any expense connected therewith is within the terms of section 94. Section 6 provides for a board of local improvements, of which the public engineer is a member, and Fred Morse was public engineer and a member of the board and its secretary. The board had some arrangement by which J. E. Schwab acted as engineer of the board for the mutual benefit of himself and Morse, who was to get twenty per cent of the compensation. One of the duties of the board is prescribed by section 85, which requires the board to cause the entire work done pursuant to any proceeding and contract and the materials therefor to be carefully inspected during the progress of the work, to the end that the contractor or contractors shall comply fully and adequately with all the provisions of the ordinance and with the contract under which the work is to be done and the specifications therefor. This duty being imposed upon the board of local improvements, its performance is one of the expenses which must be paid out of the general fund, except so far as it may be covered by the six per cent of the amount of the assessment.

The ordinance provided for the inclusion of six per cent of the tax, amounting to \$4569.20, and it was objected that the provisions included court costs. Such costs, however,

might be included in the six per cent as a part of the costs in making and collecting the assessment, as provided in terms by the statute.

It is assigned for error that the court admitted improper evidence on the trial before the jury in permitting witnesses to state that the street was muddy in wet weather and impassable for a car without chains and that cars sometimes were stuck in the mud. Such evidence was not competent for the purpose of showing the necessity of paving the street, which had been determined by the city council. (*City of Rock Island v. Marshall*, 263 Ill. 133.) Properly limited it would be competent to show the existing physical condition of the street on the question of benefits which would result from paving it.

The court gave at the instance of the petitioner the following instructions concerning the burden of proof:

"The court instructs the jury that the city establishes a *prima facie* case by the introduction of the special tax roll, as admitted in evidence, and that the burden is on each objector to overcome that *prima facie* case by competent evidence."

"The court instructs the jury that the burden is on each objector to prove by the greater weight of all the evidence that his particular lot or parcel of land will not be specially benefited as much as it has been specially taxed."

The legislature may provide that where an administrative authority is charged with the duty of determining a fact its determination shall be *prima facie* evidence of the fact, and by section 49 of the Local Improvement act the assessment roll returned by the officer or as revised and corrected by the court on the hearing of legal objections shall be *prima facie* evidence of the correctness of the amount assessed against each objecting owner but shall not be counted as the testimony of any witness or witnesses in the case. Such a provision means only that a determina-

tion of a fact so made shall be sufficient to justify a finding of its existence in the absence of any evidence to the contrary. The burden of proof is always on the party having the affirmative of a proposition, and it abides with that party until a final determination of the proposition. A proceeding to confirm a special tax is one to fix a burden and charge upon property, and the burden of proof is on the petitioner to show both the legality and the justice of the charge. (*City of Peru v. Bartels*, 214 Ill. 515.) When an issue is formed the decision rests upon competent legal evidence and not upon the act or conclusion of an officer making up a tax roll. On a trial of the issue the roll is not evidence of anything. (*City of Rockford v. Mower*, 259 Ill. 604; *People v. Whitesell*, 262 id. 387; *City of Peoria v. Peoria Railway Co.* 274 id. 48; *City of Chicago v. Lederer*, id. 584; *Donovan v. St. Joseph's Home*, 295 id. 125.) The suggestion that similar instructions as to the burden of proof were given at the instance of the appellants is unfounded. There was no instruction asked by them or given which placed the burden on them.

The court also gave to the jury this instruction:

"The court instructs the jury that the amount of the special tax shown by the special tax roll, if confirmed by the court, does not amount to a judgment or finding that the property shall finally pay the amount of the special tax, but that the same is but an estimate of what its proportionate amount of the cost of the proposed improvement will be, and that it is the duty of the city to contract for the proposed improvement for the lowest amount possible, and that the property owners have the right under the law to themselves take over the contract for such construction, and that if in either manner the proposed improvement shall be constructed for an amount less than such estimate, then, under the law, each property owner will be entitled to a deduction or re-payment by the city upon his special tax of his proportionate part of the difference between the es-

timate and the actual cost of the construction of the proposed improvement."

The statement of the law was correct but it was a matter with which the jury had not the slightest concern. It was only for the jury to determine whether the special tax was equal to the benefit, and they should not have been encouraged to make such a finding because the actual cost of the improvement might be less than the tax. There was no more propriety in giving such an instruction than there would have been to tell the jury that an improvement might, and usually does, cost more than an estimate and a deficiency must be made up of supplemental assessments.

An instruction given for the petitioner told the jury that if they determined that the property would be specially benefited as much or more than it had been specially taxed their work would be done, but if they should decide in the negative, then they should proceed to determine in what amount, if any, the several pieces of property would be benefited. The instruction furnished no guide to the determination of any question submitted to the jury, but practically told them that their work would be short and easy if they found for the petitioner, and that should not be done.

There were reductions as to some pieces of property, creating a deficiency of \$2143.95, and the court ordered the deficiency taxed against the public as public benefits, to be paid by the city of Carlinvillle. This is the subject of a cross-error. It was in direct contradiction of section 50 of the Local Improvement act, which requires any deficiency to be distributed upon the other property in the district assessed. If any improvement is to be made by special tax, the question whether the public shall pay any part is for the city council alone.

The judgment is reversed and the cause remanded.

Reversed and remanded.

(No. 13935.—Decree affirmed.)

D. DEWITT PLANK *et al.* Plaintiffs in Error, *vs.* FRANK PLANK *et al.* Defendants in Error.

Opinion filed April 19, 1922—Rehearing denied June 9, 1922.

1. **BILLS OF REVIEW**—*what necessary to set aside decree on the ground of fraud.* To maintain a bill of review to open up a decree on the ground of fraud the allegations and proof of fraud must be clear and conclusive, as a decree will not be set aside except for strong and satisfactory reasons, and it must be alleged and proved that the fraudulent acts complained of operated to procure the decree sought to be opened up.

2. **SAME**—*false testimony is not sufficient, of itself, to warrant opening up a decree.* The fact that false testimony was heard in the original proceeding is not, of itself, sufficient to warrant opening a decree on the ground of fraud, but the fraud alleged and proved must be in the procuring of the decree itself.

3. **SAME**—*when alleged false testimony cannot be said to be a fraud upon the court.* Testimony that a grantor was of sound mind when he entered into a stipulation for a family settlement cannot be said to be a fraud upon the court, which entered a decree pursuant to the stipulation, where the evidence in the proceeding to open up the decree is conflicting on the question of the mental capacity of the grantor, and in the absence of positive proof of a conspiracy to defraud the court such testimony does not justify setting aside the decree by a bill of review.

4. **SOLICITORS' FEES**—*when defendant, on review of decree dismissing bill of review, cannot complain of judgment for solicitors' fees.* On writ of error to reverse a decree dismissing a bill of review, a defendant, by assigning cross-errors, cannot complain of a judgment against him for solicitors' fees rendered when the decree which the bill seeks to review was entered, where there is no evidence that fraud was practiced on the court in procuring the allowance of the fee, but such question should be raised on appeal or writ of error in the original proceeding.

WRIT OF ERROR to the Circuit Court of DeKalb county;
the Hon. C. F. IRWIN, Judge, presiding.

WILLARD M. McEWEN, HENRY W. PRENTICE, and
HARRY W. McEWEN, for plaintiffs in error.

FRANK E. WETMORE, for defendant in error Bert R. Plank.

C. D. ROGERS, and A. G. KENNEDY, for other defendants in error.

Mr. CHIEF JUSTICE STONE delivered the opinion of the court:

This cause comes to this court on writ of error to review a decree entered on April 22, 1919, by the circuit court of DeKalb county in four certain cases therein consolidated. Two of these cases were filed by plaintiff in error D. DeWitt Plank and are bills in the nature of bills of review, seeking to set aside two certain decrees entered on the 28th day of April, 1914, one in a case brought by defendant in error Frank Plank against his father, William W. Plank, and the other brought by defendant in error Bert R. Plank against his father, William W. Plank. These cases were bills for injunction, seeking to restrain William W. Plank from taking from F. O. Crego, and to enjoin Crego from surrendering, certain deeds deposited in escrow with Crego by William W. Plank. The grantees named in these deeds were Frank and Bert R. Plank, respectively. The other two cases consolidated consisted of a bill to set aside the will of William W. Plank, now deceased, filed by Fay Plank, and an appeal taken by D. DeWitt Plank from an order of the probate court probating the will of William W. Plank, executed November 18, 1912. The circuit court dismissed the bills in the nature of bills of review for want of equity. By the same decree it dismissed the bill to contest the will for want of equity, and also ordered the probate of the will.

The decrees in the cases of Bert R. and Frank Plank against William W. Plank were entered on hearing in those cases, and in conformity with a stipulation of all parties interested in the subject matter thereof, as a settlement of their disputes and differences regarding the same. This

stipulation was executed April 21, 1914. By the stipulation and the decree entered in each of those cases immediate delivery of the deeds held in escrow was made to Bert R. and Frank Plank, and certain transfers were made to Mary Wheeler, a daughter of William W. Plank. The stipulation recites that William W. Plank desires to settle his affairs among his children. It also provides for his maintenance by them during his life, and sets out that he expects to make a will by which the balance of his estate shall go to those of his heirs not parties to the stipulation.

The decree here sought to be reviewed in the case of Bert R. Plank against William W. Plank and others, recites that upon the bill and answer and on oral and documentary proofs the court finds that the complainant therein, Bert R. Plank, was of the age of forty-nine years, a son of William W. Plank; that until about three years prior to the commencement of that suit he had resided with his father and worked for him upon his different farms with no fixed reward or compensation; that during that time his father acquired several hundred acres of farm land and had made gifts of real estate and personal property to other of his children,—to DeWitt Plank, Marcus E. Plank and Mary Wheeler, William Plank, then deceased, and his grandchildren, Fay Plank and Helen Hess, children of William Plank. The decree further finds that on March 4, 1904, William W. Plank, with the purpose of making final settlement and disposition of his property matters, executed a will and certain deeds, which deeds were to be held in escrow, making disposition of all the property owned by him; that the deeds were placed in the hands of T. A. Luney, who thereafter died, and the deeds were then placed in the hands of Floyd O. Crego; that one of these deeds of conveyance was made to testator's son Bert, one to his son Frank and one to his son Marcus. The decree also finds that William W. Plank did not reserve the right to recall or revoke any of the deeds placed in escrow; that on or about the first of June,

1912, William W. Plank made demand upon Crego to surrender and deliver up the deeds to him; that Bert R. Plank brought proceedings to restrain William W. Plank from taking the deeds; that on the 5th of August, 1913, William W. Plank deeded to his daughter, Mary Wheeler, the Root farm, in DeKalb county, being the same lands described in the deed held in escrow by Crego in which Bert R. Plank was grantee; that on the 21st of April, 1914, the stipulation herein referred to was made; that the aggregate value of the property involved in that suit and the one of Frank Plank against William W. Plank, together with the other property of William W. Plank referred to in the stipulation, was upwards of \$200,000, in which Bert R. Plank had an interest of \$50,000. The decree allowed fees to counsel for Bert R. Plank in the sum of \$3000; ordered that Mary Wheeler and her husband convey by proper deeds to Bert R. Plank the farm known as the Root farm, for which the deed to Bert was held by Crego in escrow, and that Crego be directed to deliver up to Bert R. Plank the deed of conveyance held by him in escrow, in pursuance of the stipulation.

In the case of Frank Plank against William W. Plank the decree recites practically the same findings as to the relations of the parties, setting out that Frank Plank was of the age of fifty-five years; that he had resided at home with his father for a period of about thirty-four years after he attained his majority and worked for his father without a fixed compensation; that the deeds to him made and placed in the hands of Luney, and later in the hands of Crego, were made in accordance with a settlement by William W. Plank of his property interests among his children. After setting out the terms of the stipulation and agreement it was ordered that Crego surrender and deliver up the deeds of conveyance held by him for Frank Plank in pursuance of the stipulation; that title to the lands therein described be in Frank Plank; that Frank Plank convey to

Mary Wheeler a farm of 320 acres in Oceana county, in the State of Michigan, which he held in his name, and ordered that William W. Plank execute deeds to Mary Wheeler for certain property in DeKalb county and the city of DeKalb in accordance with the stipulation, and assign over to Frank Plank certain mortgages held by William W. Plank.

These decrees were, as we have seen, entered on the 28th day of April, 1914. The bill in this case to review them was filed in October of that year. The ground upon which it is sought to open up the decrees entered on April 28, 1914, is, that the same were procured by fraud upon the court. It is conceded that whether or not a fraud was committed in procuring the decrees sought to be set aside depends upon whether or not William W. Plank was of unsound mind at the time the stipulation in settlement was entered into, and whether the witnesses who testified that he was of sound mind knew, when so testifying, that the contrary was true but kept the truth from the chancellor, and it is admitted that the decrees entered under the stipulation should not be set aside if plaintiffs in error have not shown such unsoundness of mind and knowledge thereof on the part of the witnesses testifying in the proceedings in which the decrees were entered. They are therefore the controlling questions on this phase of the case.

The will which is attacked in one of these cases consolidated was made on November 18, 1912. A jury was waived by the agreement to consolidate. The basis of the attack in that case was that the testator was of unsound mind. The question, therefore, of first importance in these cases is the soundness of mind of William W. Plank on November 18, 1912, and on April 21, 1914, when he signed the stipulation in question. To maintain a bill of review to open up a decree on the ground of fraud, charges and proof of fraud must be clear and conclusive. (*Harrigan v. County of Peoria*, 262 Ill. 36; *Miller v. Rowan*, 251 id.

344.) A decree once entered in a court of record will not be set aside except for strong and satisfactory reasons. It must not only be charged, but the evidence must show, that the fraudulent acts complained of operated to procure the decree sought to be opened up. The fact that false testimony was heard in the original hearing is not, of itself, sufficient to warrant opening a decree. The fraud alleged and proven must be in the procuring of the decree itself, before a court of equity will open up the same. (*Boyden v. Reed*, 55 Ill. 458; *Rae v. Hulbert*, 17 id. 572; *United States v. Throckmorton*, 98 U. S. 61.) The fraud alleged here is that witnesses knowing that the testator, William W. Plank, was of unsound mind nevertheless deceived the court and kept those facts from it, and thereby procured the entry of this decree.

Much testimony was introduced, as is usually done in cases where the mental competency of a grantor or testator is involved. It would serve no good purpose to go into a detailed analysis of the testimony of these witnesses, and to do so would extend this opinion far beyond reasonable limits. Plaintiffs in error offered forty-four witnesses and the defendants in error thirty-five, most of whom testified concerning the soundness of mind of William W. Plank. More than 300 exhibits were offered in evidence, the majority of which were offered as evidence of business transactions of the testator. Many of plaintiffs in error's witnesses testified that they considered William W. Plank to be of unsound mind at the time of the making of the will, in November, 1912, and also at the time of the making of the stipulation attacked here, in April, 1914, while those offered by defendants in error were of the opinion he was then of sound mind. The testimony upon both sides of this lawsuit, however, discloses that William W. Plank did transact business for himself up to a short time before his death, which occurred in July, 1914. It appears that at the time of his death he was approximately ninety-one years

of age; that during his life he accumulated a large amount of real estate in this State and in Michigan; that on March 24, 1904, he executed and delivered in escrow the deeds which were the subjects of the suits filed against him in 1912 by Frank Plank and in 1913 by Bert R. Plank, seeking to enjoin his recovery of the possession of the deeds. Numerous witnesses testified to the peculiarities of William W. Plank, covering a period from 1891 up to the time of his death, from which peculiarities they gave the opinion that he was not able to transact business. On the other hand, a large number testified to certain business transactions or a long acquaintance with him, and gave the opinion that he was of sound mind.

The basis of the fraud alleged here is, as we have seen, the charge on the part of plaintiffs in error that the witnesses who testified in the suits sought to be reviewed knew that William W. Plank was not of sufficiently sound mind to understand the nature of the stipulation he was signing and that he was incapable of transacting business. Without reviewing in detail the testimony offered on both sides as to the mental condition of William W. Plank prior to the date of the making of the stipulation in question, it is sufficient to say that there is such a conflict of testimony concerning his mental condition that it could not be said that the witnesses who testified on the hearings at the time of the entry of the decrees attacked by this bill knew that William W. Plank was *non compos mentis* or could not honestly have been of the opinion that he was mentally competent to transact business. Unless the evidence discloses clearly that they knew, or should have known, that he was *non compos* and that there was no room for an honest opinion to the contrary, it cannot be said, in the absence of positive proof amounting to proof of a conspiracy to defraud the court, that a decree can be set aside on the ground that such testimony was a fraud upon the court. The stipulation was signed by William W. Plank in the

presence of Mary Wheeler, his daughter, Leonard Wheeler, her son, Julius E. Matteson and John A. Dowdall, solicitors for William W. Plank and Mary Wheeler. The evidence shows that the stipulation was prepared at a conference in which these parties and Thomas M. Cliffe and Zachariah Wheeler, the husband of Mary Wheeler, were present, as were defendants in error herein and their counsel. The record shows that almost an entire day was spent in the discussion and settlement of the matters set out in the stipulation, that William W. Plank was advised by his attorneys, and that when the stipulation was signed it was satisfactory to all parties in interest. While Mary Wheeler, the daughter, on the hearing in this cause testified that she told her father, after he signed the stipulation, that the settlement was not satisfactory to her, and testified that he did not have sufficient mental capacity to understand the stipulation at the time he signed it, it appears from the record that under the stipulation she received property amounting to approximately \$30,000, and she raised no question at the time of the signing of the stipulation as to the mental capacity of William W. Plank. There is no charge and no evidence of an arrangement between those making the stipulation to procure the benefits of a decree thereon by deceiving the court. The charge is that a fraud was practiced on William W. Plank by the defendants in error and counsel for William W. Plank to get his signature to the stipulation and on the court by the witnesses who testified. These were Julius E. Matteson, counsel for William W. Plank, John M. Carpenter and C. D. Rogers. Of these, Matteson testified on the hearing before the chancellor. They are men of high standing and reputation for integrity. Undue influence is not charged in the matter of the signature to the stipulation and the record contains no proof of the same.

On a review of the evidence as to what occurred at the time of the signing of the stipulation, we are forced to

the conclusion that when witnesses testified that they considered William W. Plank to have been of sound mind at the time of the signing of the stipulation and also at the time of the making of the deeds in question, it cannot be said that they then knew that he was mentally incompetent to transact business or that their opinion as to his soundness of mind was not honestly held and given. The stipulation in this case, by giving the deeds put in escrow to the grantees immediately rather than upon the death of William W. Plank, carried out only that which the stipulation recognized was to be carried out on his death. The settlement was not confined entirely to the property described in the deeds put in escrow. It included also certain property taken in the name of Frank Plank which William W. Plank contended belonged to him. By the stipulation Frank Plank was required to deed this property to the daughter, Mary Wheeler. It also provided that other property was to go by will to his other heirs.

The testimony offered in support of the bills in the nature of bills of review in this case does not make the clear showing required in order to justify opening up the decrees, and the chancellor did not err in so holding. Nor can we say on a review of the testimony in the record that the chancellor erred in holding that the will made by William W. Plank in November, 1912, was a valid will. The testimony in the record as offered for the most part applied to all of the cases consolidated. The evidence of the contestants on this point tends to show that the will was not read over by the testator before he signed it; that he was eighty-nine years of age, feeble physically and mentally. The testimony of the proponents shows that at his request the will was drawn by John A. Dowdall and Julius E. Matteson, who witnessed it, and both of whom testified as to the mental capacity to make the will. On consideration of all the testimony concerning the mental competency of William W. Plank, we are of the opinion that we would not

be justified on this record in reversing the holding of the chancellor that he was mentally competent to make a will at the time the same was executed by him. It follows that it was not error, therefore, to order probate of the will of November 18, 1912.

Defendant in error Bert R. Plank seeks by assignment of cross-errors to be relieved in this proceeding from a judgment for solicitors' fees amounting to \$3000, entered against him at the time the decree was entered disposing of his suit against William W. Plank. He contends that the same was allowed against him when he was not in court and without his knowledge or consent. The record discloses concerning the matter of fees that counsel in whose behalf judgment for the fees was entered wrote Bert R. Plank at the time the bill to restrain his father from obtaining possession of the deed to him in escrow was filed, saying that their fees would be one-fifth of the amount recovered by them in the proceedings, contingent upon such recovery. The record also discloses a letter from him to Kennedy & Rogers, his counsel, saying that he thought their fee was pretty high but that he did not want to try to induce a reduction, or words to that effect, but he did not intimate in that letter that he would not pay the fee suggested by his counsel. The record shows that he secured in the final adjustment of the matter property amounting to over \$30,000, and that the fee assessed in this case and provided for in the decree is about one-half of the one-fifth which counsel demanded and which he did not refuse. Moreover, there is no evidence whatever that fraud was practiced on the court in procuring by the decree the allowance of the fee in question. Had Bert R. Plank desired a review of such decree it should have been had by a direct proceeding on appeal or writ of error.

The record in this case contains no reversible error, and the decree will therefore be affirmed.

Decree affirmed.

(No. 14477.—Judgment affirmed.)

STANISLAW ZAKROCZYMSKI, Exr. Appellant, vs. JULIUS
ZAKROCZYMSKI, Appellee.

Opinion filed April 19, 1922—Rehearing denied June 8, 1922.

1. STATUTES—*re-enacted statute will be given its former construction.* Where the legislature has re-enacted in substantially the same words a law which has been judicially construed it will be presumed that the provision was re-enacted in view of the meaning which has been given to it by the court.

2. DOWER—*surviving husband, omitted from wife's will, is entitled to share in personal property.* Since the enactment in 1872 of the statute giving a husband and wife the same rights of inheritance, and the re-enactment, in 1874, of section 10 of the Dower act, a surviving husband who has been omitted from his wife's will giving all her property, which consisted entirely of personalty, to her children, is entitled to one-third of the personal estate, the same as if the wife had died intestate. (*In re Taylor's Will*, 55 Ill. 252, followed.)

THOMPSON and FARMER, JJ., dissenting.

APPEAL from the Second Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

HENRY N. MILLER, for appellant.

GIBSON & SCHWABA, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

Teofila Zakroczymski died leaving her husband and three sons her heirs and leaving an estate of several thousand dollars, consisting wholly of personal property, which she bequeathed by her will to her three sons in equal parts, making no mention of her husband. The executor filed in the probate court of Cook county his final report showing distribution of the estate to the three sons. The husband claiming to be entitled to one-third of the estate after the

payment of debts objected to the report, his objection was sustained, and the executor was directed to reform his report by deducting from the items paid to the sons an amount equal to one-third of the estate and pay that amount to the husband. On appeal to the circuit court the same order was made. A part of the estate consisted of a note for \$2000, inventoried as unsecured and desperate, which the executor had delivered to the sons as a part of the estate, and the effect of the order of the court was to charge him with its amount as cash. The Appellate Court on appeal agreed with the circuit court on the main question but found that it was error to charge the executor with this worthless note, and for this error, only, reversed the judgment and remanded the cause to the circuit court, with directions to require the executor to collect the note, if possible, and then distribute the proceeds, one-third to the surviving husband and two-thirds in accordance with the provisions of the will. The executor having obtained a certificate of importance, has appealed to this court.

The question for decision is whether a surviving husband is barred from all interest in the estate of his wife whose will makes no provision for him, where the estate consists of personal property, only.

The descent of property is regulated wholly by statute. Before July 1, 1872, a husband took no interest, by reason of his wife's death, in her property, real or personal, where she left children surviving. A widow, however, was entitled to a life estate in one-third of her husband's lands if he died intestate, which was called dower, and one-third of his personal estate after the payment of debts. The statute on wills authorized the husband to dispose of all his property, real and personal, by will, but this right was limited by section 10 of the Dower act, which provided: "Every devise of land, or any estate therein, by will, shall bar her dower in lands, or of her share in personal estate, unless otherwise expressed in the will; but she may elect

whether she will take such devise or bequest, or whether she will renounce the benefit of such devise or bequest, and take her dower in the lands, and her share in the personal estate of her husband." If the will made any devise of land to her it barred her interest in both the real and personal estate if she accepted the provision, but she had the privilege to elect whether she would take the provision made in the will or her dower and one-third of the personal property. In this condition of the law a case arose in which a testator in 1867 made a will containing this declaration: "Second.—It is my will that my wife, Margaret N. Taylor, shall have and take of the property of which I may die possessed, only so much thereof as by the law of the land she may be entitled to, she being possessed of considerable property in her own right. I therefore make no bequest or devise to her." The wife claimed dower and one-third the personal estate, but the objection was made that the estate was not intestate and the Statute of Descent applied only to cases of intestacy; that she could not renounce the will and elect to take her dower in the land and one-third of the personalty, as the statute only provided for a widow doing so where her husband's will had made a devise of land, or some estate therein, to his wife. The court, construing the statute, held that "where a husband makes a will but makes no devise or bequest to his wife, his estate as to her is intestate to the extent of her legal claims, and that under our law it is not in the power of the husband so to dispose of his estate as to deprive his widow of the third of the personal property remaining after the payment of his debts, and that there is one-third of the realty beyond his disposal by will unless a devise or bequest to the wife be made therein which she is willing to and does accept." (*In re Taylor's Will*, 55 Ill. 252.) This construction of the statute has been followed by the courts in later decisions and has been universally regarded as the settled law of this State. *Laurence v. Balch*, 195 Ill. 626; *Rich-*

ardson v. Trubey, 240 id. 476; *Bennett v. Bennett*, 282 id. 266.

In 1872 the act in regard to the descent of property was passed, which gave the husband and wife for the first time the same rights of inheritance. The Dower act was not amended and the husband's estate of curtesy in the wife's land and her dower in his land were not affected. In 1874 the Dower act was amended, the husband's estate of curtesy was abolished and the same right of dower was given to the husband and wife in the lands of the other. Section 10 was re-enacted with some changes not material to the question here and appears in the Revised Statutes of 1874 as follows: "Any devise of land, or any estate therein, or any other provision made by the will of a deceased husband or wife for a surviving wife or husband, shall, unless otherwise expressed in the will, bar the dower of such survivor in the lands of the deceased, unless such survivor shall elect to and does renounce the benefit of such devise or other provision, in which case he or she shall be entitled to dower in the lands and to one-third of the personal estate after the payment of all debts."

The omission of the words "or of her share in personal estate" is immaterial, because it was only in the case of intestate estates that section 43 of the Statute of Wills, which declared the rule of distribution of intestate estates, provided that a widow should receive one-third of the personal estate, and both before and after 1872 it was only by the last clause in section 10 of the Dower act that a widow was entitled to take her share in the personal estate where the estate was testate. Where the legislature has re-enacted in substantially the same words a law which has been judicially construed, it will be presumed that the provision was re-enacted in view of the meaning which has been given to it by the court. (*Kelley v. Northern Trust Co.* 190 Ill. 401; *McGann v. People*, 194 id. 526; *Spiehs v. Insull*, 278 id. 184; *People v. Stewart*, 281 id. 365.)

Section 10 of the act must therefore be regarded as having the meaning which had been perviously given to it by the construction in the *Taylor case*. The decision of the court in that case at the time it was rendered had no application to the rights of a surviving husband, but since the change made by the statute of 1872 in regard to the descent of property and the dower of the husband in his wife's real estate the situation is exactly the same in the case of the husband as in that of the wife, and that decision is applicable to the case of the former as well as to that of the latter.

No cross-error is assigned as to the action of the court in regard to the uncollected note.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THOMPSON and FARMER, JJ., dissenting:

The question here presented for decision, as we view it, has never been decided by this court. The decisions cited in support of the conclusion reached are not in point.

The *Taylor case*, *supra*, involved a will made in 1867 and the case was decided by this court in 1870,—two years before our present Statute of Descent was enacted and four years before our present Dower act became a law. The decision is based on the obsolete doctrine of widow's thirds, which the court held was established in this State by the Ordinance of 1787, which, after regulating the descent and distribution of intestate property, made this declaration: "Saving in all cases to the widow of the intestate her third part of the real estate for life and one-third part of the personal estate," which provision was carried into the laws of this State in 1819. A more comprehensive provision was enacted by the General Assembly of this State in the laws of 1829 and 1847, where the word "dower" was declared to include one-third of the personal estate. The Statute of Descent of 1872 has no such saving clause in favor of the

widow, and there has never been such a provision in the laws of Illinois in favor of a widower. The opinion is based on the theory that "it is the common law in this State" that the widow in all cases is entitled to one-third of the husband's real estate for life and one-third of his personal estate forever, which shall remain after the payment of debts, unless the husband shall by his last will and testament make some devise or bequest to her which she is willing to accept. It might have been said with propriety at that time that it was the public policy of this State to protect the widow's thirds, but it certainly could not be said on authority that it was the common law of the State, because the State does not get its common law from the Ordinance of 1787 or from any other ordinance or statute enacted by a legislative body in this country. The *Taylor case* is further distinguishable from the case at bar for the reason that the testator mentioned his wife in his will and declared that she should have so much of his property as she was entitled to under the law. The real question, therefore, decided in that case was the amount of property which the testator intended to give to his widow. Whatever may have been the intent of the testator in the *Taylor case*, there can be no doubt that in the case at bar the testatrix intended that her husband should have no part of her estate.

The facts in the case of *Laurence v. Balch*, cited by the court, presented for decision the question presented here, but the court did not consider or decide it. Counsel admitted in that case that the surviving husband was entitled to some of the personal property of testatrix, and the only question argued and presented to the court for decision by the briefs of counsel was whether he was entitled to one-third of the personal property or to all of it. The court was not asked to determine whether the widower took nothing, and we are not to assume that the court would have decided the case as it did if the question had been properly presented.

In *Richardson v. Trubey*, *supra*, the testatrix died owning both real and personal property and gave to her husband by her will whatever interest in her estate he was entitled to under the law. The court decided that it was her intention, the whole will being considered, to give him what he would have taken by renouncing the benefit of a provision of a will making provision for him and taking the share which he would have been entitled to under section 10 of the Dower act. Real estate was involved in that case, and she could not have deprived him of his rights in her real estate except by making provision for him in her will which he was willing to accept. The question decided in that case is not the question in this case, and though language was used in the opinion which does bear on the question presented here, it was dictum and is not controlling. *Bennett v. Bennett*, *supra*, presented similar questions for decision and is not in point.

The Statute of Descent has no application whatever to the question presented and need not be considered.

The Dower act, according to its title, purported to revise the law in relation to dower, only, and does not in any respect purport to revise the law in relation to personal property, wills or descent. Section 1 of the Dower act has no bearing on the question presented because no real estate is here involved. Section 10 of the Dower act provides: "Any devise of land, or estate therein, or any other provision made by the will of a deceased husband or wife for a surviving wife or husband, shall, unless otherwise expressed in the will, bar the dower of such survivor in the lands of the deceased, unless such survivor shall elect to and does renounce the benefit of such devise or other provision." Where no provision is made in a will which the surviving spouse may take in lieu of dower, this section does not create in the surviving wife or husband any interest in the real or personal property of the deceased. It simply provides a method by which the surviving spouse can relinquish

dower after the death of the deceased. A husband or wife cannot deprive the other of dower in his or her lands by making a transfer by deed, will or otherwise. If the transfer is made during the lifetime of the proprietor, the husband or wife, as the case may be, must join in the instrument of conveyance and relinquish dower in legal form. If the transfer is made by will the surviving spouse may relinquish dower by accepting the provisions made for him or her by the will of the deceased. If these provisions are not satisfactory, section 10 of the Dower act gives a surviving spouse the right to renounce the provisions of the will, and the last clause of section 10, "in which case he or she shall be entitled to dower in the lands and to one-third of the personal estate after the payment of all debts," simply provides a share of the estate which the surviving spouse may take in lieu of the share given by the will. Where no provision is made by the will of a deceased husband or wife for the surviving wife or husband, section 10 of the Dower act has no application whatever. In such case the surviving spouse takes dower in the real estate not by virtue of section 10 but by virtue of section 1 of the Dower act, and he or she takes no interest whatever in the personal estate of the deceased.

Personal property is free from any interest corresponding to dower. Neither the husband nor wife has any right, inchoate or otherwise, to any share of the personal property of the other which the other cannot defeat. Neither has any right of dower therein. The owner, whether husband or wife, can dispose of his or her personal property according to his or her own whim and pleasure and die leaving no personal property to be distributed among the surviving spouse and the children. Such an unrestricted right of disposition is manifestly inconsistent with the idea of a fixed and vested right on the part of either spouse to the personal property of the other. (*In re Taylor's Will, supra; Padfield v. Padfield*, 78 Ill. 16; 13 R. C. L. 1078; 10 Am.

& Eng. Ann. Cas. 1053, note.) Section 10 of the Dower act, therefore, has no application to personal property, because the dower referred to in said section relates to dower in lands. There being no dower in personal property there is none to bar. We are not left in doubt in this matter, for the language of the section itself says that the acceptance of the provision made by the will shall "bar the dower * * * in the lands of the deceased." Since neither spouse has any interest in the personal property of the other during the lifetime of the owner, by what law does the surviving spouse get title to any portion of the personal property of the deceased where the deceased dies testate? There is certainly no provision in the Dower act which gives the surviving husband or wife such title. Section 10 of the Dower act now in force does not recognize any interest of the surviving spouse in the personal estate of the deceased, as the same section in the act of 1845 in force when the *Taylor case* was decided, did. The section then provided: "Every devise of land, or any estate therein, by will, shall bar her dower in lands, *or of her share in personal estate*, unless otherwise expressed in the will; but she may elect whether she will take such devise or bequest, or whether she will renounce the benefit of such devise or bequest, and take her dower in the lands, and *her share in the personal estate* of her husband." The law of this State at the time the *Taylor case* was decided specifically recognized the widow's interest in her deceased husband's personal estate, and that decision must be construed in the light of the law then in force. It is not authority for the proposition that the widower takes a third of his deceased wife's personal estate where she dies testate owning personal property only, and makes no provision in her will for her surviving husband.

We recognize the fact that the bar has generally understood the law to be as it is stated in the principal opinion. This is probably due to the dicta appearing in three or four opinions of this court to that effect, but that affords no rea-

son for our declaring as the law that which is not the law and which has never been the law of this State. We have repeatedly said that the fact that the bar and the courts have for a long time assumed the law to be what it is not, does not change the true law. When the question is finally squarely presented to us it is our duty to declare the law as we find it. Two recent cases will serve to illustrate our point. (*People v. Russel*, 245 Ill. 268; *Prall v. Burckhardt*, 299 id. 19.) This case does not present a question of statutory construction. The court is asked to declare as law that which has been heretofore assumed to be the law when no foundation in law existed for such assumption.

(No. 14381.—Judgment affirmed.)

JAMES F. BISHOP, Admr. Appellant, vs. THE CHICAGO RAILWAYS COMPANY, Appellee. *

Opinion filed April 19, 1922—Rehearing denied June 9, 1922.

1. CONSTITUTIONAL LAW—*meaning of constitutional provision requiring embodiment of entire act or section in an amendatory statute.* The constitutional provision prohibiting the amending of an act by reference to its title, only, and requiring the amended sections or acts to be inserted at length in the amendatory act, does not mean that all prior acts in any way modified shall be published at length, nor does it apply to amendments which constitute merely an addition of a section to the act, where the original act does not have to be read with the new in order to give effect to the latter.

2. SAME—*section 2 of act of 1873 amending Limitations act is not invalid.* Section 2 of the act of 1873 amending the Limitations act and constituting paragraph 25 thereof does not amend the language of any section of the Limitations act and is not in violation of section 13 of article 4 of the constitution, forbidding the amendment of an act by reference to its title, only.

3. INJURIES—*limitation of suit under Injuries act is condition of the liability and is not a statute of limitations.* The limitation of one year in which to bring suit for wrongful death under the Injuries act is not a statute of limitations but is a condition of the liability itself, and there is no right to sue unless the plaintiff brings himself within the conditions of the act.

4. *SAME—action for wrongful death is not an action for personal injuries.* The right of personal representatives to sue for wrongful death under the Injuries act is not a right of action for personal injuries within the meaning of the Limitations act.

5. *LIMITATIONS—effect of section 2 of act of 1873 amending the Limitations act.* Section 2 of the act of 1873 amending the Limitations act, and constituting paragraph 25 of said act, fixes an additional period of limitation arising under certain conditions therein set out, and applies only when such conditions are met.

6. *SAME—section 2 of act of 1873 amending the Limitations act does not apply to actions for wrongful death.* Section 2 of the act of 1873 amending the Limitations act and allowing the commencement of a new action within one year after a judgment is reversed or given against a plaintiff applies only to the actions specified in the Limitations act and does not apply to an action for wrongful death under the Injuries act.

THOMPSON, J., dissenting.

APPEAL from the Superior Court of Cook county; the Hon. JACOB H. HOPKINS, Judge, presiding.

JAMES C. McSHANE, for appellant.

CHARLES LEROY BROWN, (JOHN R. GUILLIAMS, and JOHN E. KEHOE, of counsel,) for appellee.

Mr. CHIEF JUSTICE STONE delivered the opinion of the court:

Appellant, as administrator, brought suit against appellee to recover for the death of William E. Ford, who was killed November 12, 1913. The action in this case was brought July 23, 1920, under the provisions of section 2 of the act of 1873, entitled "An act to amend an act in regard to limitations." (Hurd's Stat. 1921, p. 2014.) Appellant had in December, 1913, begun an action against appellee for the death of Ford, and in his declaration made averments showing that the deceased and the appellee were working under and subject to the provisions of the Workmen's Compensation act, making no allegation, however, that they had elected to operate under the act. In March, 1915, an amendment to this declaration was filed, setting

out the election of appellee not to be bound by the Compensation act. Appellee pleaded the Statute of Limitations, which plea was demurred to and the demurrer sustained. A trial was had and a verdict returned and judgment entered thereon. Upon review in this court the judgment of the Appellate Court reversing the judgment of the superior court was affirmed. (*Bishop v. Chicago Railways Co.* 290 Ill. 194.) The judgment of this court was entered on October 17, 1919, and within a year thereafter,—that is, on July 23, 1920,—the declaration was filed in this case.

Section 2 of the act amending the Limitations act provides as follows: "In any of the actions specified in any of the sections of said act, if judgment shall be given for the plaintiff, and the same be reversed by writ of error, or upon appeal; or if a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff; or, if the plaintiff be non-suited, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the said plaintiff * * * may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after."

One of the first questions raised is as to the constitutionality of section 2 of the Limitations act, (paragraph 25,) it being contended by appellee that said section contravenes section 13 of article 4 of the constitution, in that it amends certain sections of the Limitations act and other acts without the amended sections or acts being inserted at length in the amendatory act. The test as laid down in the cases is, that where the old act must be read with the new in order to determine its provision concerning a liability, a duty or a right, or in order to give any effect whatever to the new act, then such new act comes within the terms of the constitutional provision. (*Board of Education v. Haworth*, 274 Ill. 538; *Lyons v. Police Pension Board*, 255 id. 139; *Badenoch v. City of Chicago*, 222 id. 71.) This provision

is not construed to mean that when a new act is passed all prior acts in any way modified by it shall be published at length in the amendatory act. (*Hollingsworth v. Chicago and Carterville Coal Co.* 243 Ill. 98; *Timm v. Harrison*, 109 id. 593; *People v. Wright*, 70 id. 388.) The purpose of this provision of the constitution is to avoid confusion arising from patchwork legislation, but it was not the purpose to require a practically endless reiteration of amended statutes. Section 2 of the amendatory act of 1873 does not amend the language of any section of the Limitations act so that such sections read in any manner different. No period of limitation is changed by section 2 so far as the limitation appears in the Limitations act. It fixes an additional period of limitation arising under certain conditions therein set out, and applies only when such conditions are met. An act which adds another remedy to that already provided for is not an act amending any one section of the previous act. It must be held, therefore, to be an amendment of the entire act by adding sections thereto, so that what is included within the terms of the original act is included within the terms of the amendatory act. (*Gage v. City of Chicago*, 203 Ill. 26; *Morrison v. People*, 196 id. 454.) Whether or not an act amends another section or act is not to be determined, alone, by its title, but by the effect which it has upon existing laws. (*Lyons v. Police Pension Board*, *supra*; *People v. Crossley*, 261 Ill. 78.) It cannot, therefore, be said that the act contravenes the section of the constitution referred to, and it is therefore not unconstitutional.

Appellee contends, also, that section 2 of the amendatory act (called in the briefs section 25 of the Limitations act,) is not applicable to actions arising under sections 1 and 2 of the Injuries act, to which class the action in this case belongs. This question is not free from difficulty. No right existed at common law to recover for the wrongful death of a person. The Injuries act passed by the legisla-

ture of this State in 1853 created such a cause of action for the first time in this State. This statute provides the parties in whose name the suit shall be brought and what shall be done with the proceeds of a judgment recovered thereunder. It fixes the time in which such action shall be brought. Originally the act provided that suit should be brought within two years after the death of the deceased. By amendment in 1903 this was reduced to one year. The limitation of the right to sue, fixing the exercise of such right within a year, is not a statute of limitations but is a condition of the liability itself. Where action is brought under the Injuries act in death cases the plaintiff must bring himself within the conditions of the act. (*Hartray v. Chicago Railways Co.* 290 Ill. 85; *Carlin v. Peerless Gas Light Co.* 283 id. 142.) It is seen, therefore, that the statute which creates the right,—that is, the Injuries act,—places a limitation, not on defenses to the right of action but upon the right of action itself. The Statute of Limitations may be styled a defense statute; the Injuries act is purely and simply a liability statute. The provision of the Injuries act requiring that suit be brought within a year after the death not being a limitation statute, section 2 of the 1873 amendment to the Limitations act cannot be said to be applicable to cases arising under the Injuries act unless the right of action in such cases can be seen to be included within the classes of cases embraced by the Limitations act.

The act of 1873 referred to is, as designated in its title, "An act to amend an act in regard to limitations." Section 2 of the act expresses in plain language the intention of the legislature that its provisions shall apply to "the actions specified in any of the sections of said act,"—the Limitations act. Sections 12, 13, 14 and 15 of the act relate to personal actions. Section 12 is to be read as a part of sections 13, 14 and 15. (*Handtofski v. Chicago Traction Co.* 274 Ill. 282.) Section 13 refers to actions for slander and libel. Section 14 provides, in part, that "actions

for damages for an injury to the person * * * shall be commenced within two years next after the cause of action accrued." Section 15 provides that "actions * * * to recover damages for an injury done to property, real or personal, * * * and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." Appellant contends that actions under the Injuries act in death cases are actions to recover damages for injuries to the person, or if not, they are actions to recover damages for injuries to property. It is argued that since it has been held that an action under the Injuries act in death cases survives against the representatives of the tortfeasor, within the meaning of the act relating to the survival of causes of action, it must be held to be an action for injury to the person within the meaning of the Limitations act, and counsel cite *Devine v. Healey*, 241 Ill. 34. In that case the question was whether or not an action might be brought by the administrator of a deceased person against the executor of one who was alleged to have caused the death but who since had died. It was there held that if the injured person dies from some other cause than the injury received his cause of action against the tortfeasor survives to his personal representative, but if he dies from the injury itself the only action that can be maintained is the action for the benefit of the widow and next of kin given under the Injuries act of 1853. It was there also held that under the Administration act, relating to the survival of actions, an administrator of a person whose death was caused by the wrongful act of another may maintain an action against the tortfeasor's executor under section 2 of the Injuries act. It will be seen that this decision cannot be taken as authority for the contention that a death case is an injury to the person within the meaning of the Limitations act. *Crane v. Chicago and Western Indiana Railroad Co.* 233 Ill. 259, and *Mooney v. City of Chicago*, 239 id. 414, do not decide the point in

issue here. The right to recover for personal injuries existed at common law and was a right existing in the person injured to recover for those elements of damage generally recognized in personal injury cases, and if the plaintiff die from some other cause than the injury his right of action survives to his personal representatives, as other causes of action which were in him during his lifetime might survive. If, however, he die from the injury itself the action in him does not survive but abates, and a new and different right of action is substituted; based not upon a common law right but upon a statute known as the Injuries act. This gives the right to his personal representatives to recover the pecuniary injury to the widow and next of kin occasioned by his death. Such an action is not an action for personal injuries. *Prouty v. City of Chicago*, 250 Ill. 222; *Wilcox v. International Harvester Co.* 278 id. 465; *Pease v. Rockford City Traction Co.* 279 id. 513,

Appellant contends that if actions under the Injuries act cannot be considered actions to recover damages for injuries to the person they must be considered actions to recover damages for injury done to property, real or personal, within the meaning of the Limitations act, and the argument is that the term "injury done to property" includes actions to recover for injury done to property rights. The question that arises ahead of that contention, however, is whether, if it were to be held that the right of action under the Injuries act is for injury done to property, such right of action comes within the purview of section 2 (paragraph 25) of the Limitations act. Whether or not the legislature intended to cover death cases as injuries to property must be determined from the language of section 2 and the other provisions of the Limitations act. Section 15 of the act, which fixes the limitations as to injuries to property, real or personal, limits the right to bring the action to a period of five years. The Injuries act limits liability to a period of one year. The "actions specified" in the Limi-

tations act are those named in that act. The term "specified" indicates a particular and not a general class of cases. To say that a death case comes within the purview of section 15 of the Limitations act as an injury to property is to extend the period of liability provided in the Injuries act from one year to five, for if the right of action under the Injuries act is for injury to property, as that language is used in the Limitations act, the period of limitation fixed by section 15 of the latter act must apply to death cases if paragraph 25 is to be held to apply. This proposition need be but stated to make it clear that the legislature could not have had in mind an extension of the period of liability in a death case by extension of the period of limitation relating to actions for injury to property as provided in the Limitations act. To hold otherwise would be to say that the legislature intended by the Limitations act as amended, to extend, not a period of limitation specified in the Limitations act but one of liability provided for by an entirely separate act. To so hold would be to do violence to the rules for the construction of statutes.

But it is argued that the language, "if the time limited for bringing such action shall have expired during the pendency of such suit," means, in this case, the time limited by the Injuries act. We are unable to agree with this contention. The section plainly indicates that it is dealing with actions specified in the Limitations act. There is nothing in the amendatory act nor in its title to indicate that it is to amend or to be engrafted upon the Injuries act. "The time limited for bringing such action" must, therefore, refer to the limitation provided in the Limitations act. We are of opinion, therefore, that it cannot be said that the legislature intended, in extending the Limitations act, that the period of liability in death cases should also be extended.

The superior court did not err in sustaining the demurrer to appellant's declaration, and the judgment is therefore affirmed.

Judgment affirmed.

Mr. JUSTICE THOMPSON, dissenting:

The language used in paragraph 25 of the Limitations act is vague and uncertain and strictly construed does not express the intent of the legislature, if I read the act correctly. Manifestly, the legislature intended by this act to relieve the diligent but mistaken claimant from the consequences of a technical mistake, thereby affording him an opportunity to have his claim determined on its merits. Such an act should be construed favorably to the claimant and none of its words should be given a technical meaning that would destroy the purpose of the act. I can not conceive of the legislature intending to provide a new trial for such actions as slander, libel, false imprisonment and malicious prosecution, where the injury lies in the imagination more frequently than not, and to deny a new trial, where the same condition of the record exists, in death cases, where the injury is always real. If the act in question means anything it was intended to apply to just such cases as the one before us. To give it any other construction is to attribute to the legislature an absurd and unreasonable intent. To construe the act to include actions under the Injuries act would strain the language considerably, but it would not be the first time language of a statute, or even the constitution, has been strained to give effect to remedial legislation. The questions in this case are far from being free from difficulty, but it seems to me the conclusion reached by the court does not conform to the intention which must have been in the minds of the legislature when this law was enacted. The statute is remedial in character and ought to be liberally construed in order to carry out the purpose of the act: that every claimant shall in the interest of justice and fair play have his cause determined on its merits.

(No. 14495.—Reversed and remanded.)

W. H. EMERSON, Appellant, vs. THE NORTH AMERICAN
TRANSPORTATION AND TRADING COMPANY, Appellee.

Opinion filed April 19, 1922—Rehearing denied June 8, 1922.

1. LIMITATIONS—*limitation is controlled by law of State where the suit is brought—construction.* Statutes of limitation affect the remedy, which is to be governed by the law of the State where the suit is brought, but the character and construction of a contract is determined by the law of the jurisdiction in which the cause of action arose.

2. BANKS—*certificate of deposit is not due until payment is demanded.* A certificate of deposit payable to the depositor upon return of the certificate is not due until the certificate is tendered and demand for payment is made, and a cause of action does not accrue to the holder of the certificate until such demand is made and payment is refused.

3. SAME—*when reasonable time for demanding payment is not measured by period of limitation.* The rule that a reasonable time for demanding payment of a certificate of deposit is measured by the statutory period of limitation for bringing suit and that a demand within such time will be presumed is not an inflexible one and will not be applied to a non-interest bearing certificate of deposit for safe keeping, particularly where there are circumstances proven affecting the question of what would be a reasonable time.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Municipal Court of Chicago; the Hon. WELLS M. COOK, Judge, presiding.

KNAPP & CAMPBELL, (JOHN R. COCHRAN, and LEONARD FERRIS MARTIN, of counsel,) for appellant.

JUDAH, WILLARD, WOLF & REICHMANN, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellant, W. H. Emerson, brought this suit in the municipal court of Chicago on June 15, 1917, to recover the amount of a certificate of deposit made by the appellee, the

North American Transportation and Trading Company, for \$10,000 deposited with the defendant on March 31, 1900, at Nome, Alaska, to be re-paid in gold dust at \$16 per ounce or United States or Canadian currency, at the defendant's option, upon the return of the certificate properly indorsed. Issues were formed by an affidavit of defense and submitted to the court for trial. The court heard the evidence and rendered judgment for the defendant. On appeal to the Appellate Court for the First District the judgment was affirmed, and a certificate of importance and an appeal to this court were allowed.

At the close of the evidence the court made findings of fact tendered by the plaintiff in substance as follows: The plaintiff, W. H. Emerson, on March 31, 1900, deposited with the defendant at Nome, Alaska, \$10,000, and the defendant by its duly authorized agent executed and delivered to plaintiff a certificate of deposit, as follows:

"\$10,000.00	Certificate of Deposit	No. H761
	NORTH AMERICAN TRANSPORTATION & TRADING CO.	
		Nome, Alaska, 3/31/900.

"This certifies that W. H. Emerson has deposited ten thousand dollars, payable to the order of W. H. Emerson upon return of this certificate properly endorsed. Not subject to check, and redeemable in gold dust at the rate of 16. per oz., or in U. S. or Canadian currency, at the company's option.

NORTH AMERICAN TRANSPORTATION & TRADING CO.

By R. J. Embleton."

On December 13, 1916, the plaintiff indorsed the certificate and caused the same to be presented to the defendant at its principal office in Chicago and payment was refused. The defendant is a corporation organized on April 14, 1892, under the laws of Illinois, and has at all times since that date maintained its principal office in Chicago. The plaintiff at all times since the year 1904 has resided in California. The defendant from time to time maintained and operated branches of its business at various points in Alaska, and at Seattle, in the State of Washington. Among the branches so maintained and operated in the Territory of Alaska was

one at Nome, which was operated there from the winter of 1899 to some time in 1905 but not after May 1, 1905, prior to which time the defendant discontinued its station or place of business at Nome and has not since that date had or maintained a place of business at Nome. The defendant never at any time delivered to the plaintiff the quantity of gold dust specified in the certificate nor paid to the plaintiff the amount thereof in United States or Canadian currency or returned to the plaintiff the \$10,000 deposited. The plaintiff proved all the averments of his statement of claim.

On the part of the defendant the court made the following findings of fact: The defendant is a corporation organized and existing under the laws of this State and chartered on or about April 14, 1892, and ever since has had and maintained an office and transacted business in the State of Illinois and was capable of being sued and served with process in this State, which was the same finding of fact before recited. From prior to 1900 continuously up to the time of the trial defendant was engaged in and conducted business in the Territory of Alaska by and through its certain agents and representatives in said Territory and has been capable of being sued and served with process in said Territory. The plaintiff never presented the instrument sued upon or made any demand for payment of the same until on or about December 13, 1916. From and after March 31 the certificate could have been presented to the defendant and payment demanded either in the Territory of Alaska or the city of Chicago. The Statute of Limitations of the Territory of Alaska applicable to instruments of the kind and character sued upon required action to be commenced within six years next after the cause of action had accrued.

The plaintiff tendered to the court and the court refused to hold the following propositions of law: That a cause of action does not accrue to the holder of a certificate of

deposit in the form of the one sued upon until an actual demand for payment and refusal; that the plaintiff's cause of action accrued on December 13, 1916, and not before; that the plaintiff's cause of action was not barred by the Statute of Limitations of this State or by the Statute of Limitations of the Territory of Alaska, and that the certificate was a contract, under the terms of which the defendant, upon the return thereof properly indorsed, was bound to deliver to the plaintiff either 625 ounces of gold dust or the sum of \$10,000 in United States or Canadian currency.

The defendant tendered to the court and the court held the following propositions to be the law: That the action was barred under sections 16 and 20 of the Statute of Limitations of this State; that the certificate became due and payable at its date on March 31, 1900, and the cause of action accrued thereon at that date, and the Statute of Limitations of this State began to run against the instrument from and after said date; that the cause of action accrued on March 31, 1900, and the Statute of Limitations of Alaska began to run on that date, and the plaintiff was required to commence his action in Alaska within six years thereafter; that the plaintiff was at the time of the commencement of this suit barred in the courts of Alaska and barred by section 20 of the Statute of Limitations of this State; that the plaintiff failed to make demand for the payment of the instrument sued upon within a reasonable time after the execution and delivery of the same and was therefore barred; that such reasonable time for making such demand was within six years next after March 31, 1900; that the plaintiff did not commence his suit within six years after the expiration of a reasonable time for making a demand, and in consequence thereof was barred by the Statute of Limitations of Alaska; that the plaintiff did not commence his suit within ten years after the expiration of a reasonable time for making a demand and was barred

by the Statute of Limitations of this State, and that if it should be held, as a matter of law, that plaintiff was required to make a demand within a reasonable time, such reasonable time was not in excess of the period of limitations of the Territory of Alaska,—that is to say, not in excess of a period of six years after March 31, 1900.

The trial court held every controverted question of fact for the plaintiff, but held that the action was barred in a variety of ways under statutes of limitation, applying the statute of Alaska to bar the action there to bring it within section 20 of our statute and also to fix the time when our statute would begin to run. Statutes of limitation affect the remedy which is to be governed by the law of the State where the suit is brought, but the character and construction of a contract are determined by the law of the jurisdiction in which the cause of action arose. On the question of the construction of the contract the court held that the certificate became due and payable at its date, and therefore the cause of action accrued thereon on March 31, 1900, when the deposit was made. Counsel for both parties have argued that question as being controlled by the law as decided by this court, and no question is made concerning any difference in the law of Alaska. The holding that the cause of action on the certificate accrued when it was made was not in accordance with the rule of law generally applied nor as declared in this State, and the refusal to hold the proposition that a cause of action did not accrue to the holder of the certificate until an actual demand for payment and refusal was error. The defendant was incorporated to engage in trading, transportation, navigation, or other means of transportation, warehousing, mining, and other like occupations. When the deposit was made for the certificate given at Nome there were no banks or banking facilities at that place, and the defendant received deposits, gave receipts, letters of credit or certificates of deposit, as requested by the depositor. It did not keep checking accounts

or do that branch of the banking business, but it had a book of certificates of deposit, and this one was numbered H761. The defendant not only conducted a transportation and merchandising business, operated steamboats, mines, hotels and railroads, but it did that branch of the banking business which has been stated, giving certificates of deposit. It is assumed by both parties that the business represented by certificates of deposit was a branch of the banking business, and the authorities and decisions relied upon to sustain the judgment are cases of certificates issued by banks. The rules of law so presented in argument and relied upon are at least as favorable to the defendant as those applicable in the case of savings banks or where a trust relation is created, which counsel insist is entirely absent in this case. The certificate acknowledged the receipt of \$10,000, and contained a continuing promise to return the deposit in gold dust or United States or Canadian currency, and the general rule is that in such a case a demand is necessary to fix liability and a cause of action does not accrue until a demand. A certificate of deposit payable to the depositor upon return of the certificate is not due until the certificate is tendered and demand for payment is made. (7 Corpus Juris, 650; 3 R. C. L. 582; 25 Cyc. 1096; 2 Daniel on Neg. Inst.—6th ed.—1907; *Elliott v. Capital City Bank*, 128 Iowa, 275.) The question has never been directly involved in any case in this court, but in *McCormick v. Hopkins*, 287 Ill. 66, the court quoted from *Elliott v. Capital City Bank*, *supra*, as follows: "Deposits are made in banks in accordance with universal commercial usage, which becomes a part of the law of the transaction. They are neither loans nor bailments in the strict sense of the term. A deposit is a transaction peculiar to the banking business and one that the court should recognize and deal with according to commercial usage and understanding." It had been said in *Hunt v. Divine*, 37 Ill. 137, that a certificate of deposit for a sum of money payable on re-

turn of the certificate three months after date was a promissory note, and that the maker was to find his paper and take it up and the demand was by the maker and not the holder, which, when made, would be the time to return the certificate; but in *McCormick v. Hopkins, supra*, the court said that a certificate of deposit has the settled distinguishing features of a bank deposit, but it is payable only on demand at the bank and on return of the certificate properly indorsed; that the borrower of money who executes a promissory note for it is bound to seek his creditor and pay him and the bank is not different in this respect from an individual, but a bank is not obliged to seek its depositors and pay them. In what was there said, as well as in the further consideration of the questions involved in this case, account is necessarily taken of the nature of the banking business and later usages and customs relating thereto. If it was the usage of banks in 1861, when the deposit in *Hunt v. Divine, supra*, was made, for the banker to find his certificate and take it up and the time to return the certificate was upon his demand, that was not the usage and custom thirty years afterward when this certificate was made and it has not been the usage and custom since that time, and what was said in *McCormick v. Hopkins, supra*, was correct.

Based on the finding that the cause of action accrued on March 31, 1900, when the deposit was made, the court held that the Statute of Limitations of this State barred the action ten years after that date, and on the same ground that the cause of action was barred in Alaska six years after the date of the certificate. These findings fall with the finding that the certificate was due at its date.

The finding that the action was barred under section 20 of the Statute of Limitations of this State, which provides that when a cause of action has arisen in a State or territory out of this State or in a foreign country, and by the laws thereof an action thereon cannot be maintained, an action will not be maintained in this State, was based on

the findings that the certificate was due at its date and was barred in six years in Alaska. This was incorrect, both because the defendant was all the time a resident of this State, with its principal office here, and the cause of action never did arise in Alaska since no demand was made there. It was also in direct conflict with the finding of fact that the business and branch at Nome were not maintained or operated after May 1, 1905, before the six years expired, so that the plaintiff could not have made a demand there for his money. The deposit was received at Nome and the certificate was to be returned there. The defendant having ceased to maintain its business and branch at Nome, the plaintiff was not bound to present it elsewhere unless at the place of residence and principal office of the defendant in this State. On that question it is of no importance that the plaintiff might have found an agent at some place in Alaska and have sued the defendant in that territory,—at least in the absence of any notice that the certificate would be redeemed at some other place in Alaska.

The remaining proposition of law held by the court was, that if the plaintiff was required to make a demand for payment of the certificate within a reasonable time he failed to make such demand and his action was therefore barred; that such reasonable time for making the demand was within six years after March 31, 1900, and not in excess of the period of limitation of the Territory of Alaska; that the plaintiff did not commence his suit within six years after the expiration of such reasonable time and in consequence thereof was barred by the Statute of Limitations of Alaska, and did not commence his suit within ten years after the expiration of such reasonable time and in consequence was barred by the Statute of Limitations of this State. The court applied the statute of Alaska to fix a reasonable time for making a demand, which necessarily implied that the demand was to be made in Alaska, and then applied both the Statute of Limitations of Alaska and the statute of

this State to bar the action. The Appellate Court did not approve of the finding that the certificate was due at its date without a demand, but affirmed the judgment upon the grounds that the plaintiff was required by law to make a demand within a reasonable time; that the certificate having been made in Alaska was governed by the law of that territory; that the reasonable time to make a demand for payment was within the period of the Statute of Limitations of Alaska, which ended on March 31, 1906; that the law would presume that a demand had been made within that period, and thereafter, the suit not being commenced within six years under the Alaska statute or ten years under the statute of this State, the action was barred.

It has been declared in various cases that it is the duty of the holder of a certificate of deposit to make a demand within a reasonable time, and unless a reasonable excuse appears such time will not be extended by the court beyond the statutory period of limitation; that at the expiration of that time the law will presume that a demand was made within that time, and the Statute of Limitations will begin to run from the expiration of such statutory period. The case of *Pierce v. State Nat. Bank*, 215 Mass. 18, is much relied upon and is frequently cited, and illustrates the necessity of considering the nature and purpose of different certificates of deposit and the expansion of the banking business to the safe-keeping of funds. In that case a certificate of deposit was made in 1859 and no demand was made until November 17, 1895, thirty-six years after its date, and suit was not begun until March 7, 1906, forty-seven years after the deposit. It was held that while a certificate of deposit for the most part has the incidents of a promissory note, it differs from a note payable on demand in that it is not over-due until after demand for payment; that such a certificate being payable only after demand, limitations do not begin to run until demand, and where it is not issued for money borrowed and bearing inter-

est the demand must be made within a reasonable time. The court said that the purpose and use of certificates of deposit, using that term in the proper sense, were to transmit funds and make payments like certified checks or cashier's checks; that the person desiring to transmit funds, deposited in the bank the sum to be paid or transmitted and procured a certificate of deposit, or drew his check and procured it to be certified by the bank, or procured a cashier's check, and by indorsing the certificate, the certified check or the cashier's check transmitted the money. On that ground it was held that the function performed by a certificate of deposit contemplated a presentation of it for payment within a short time, and the general rule therefore was applicable as to the time within which a demand should be made, which was the time limited for bringing action. The court said that such a certificate differs from and serves a different purpose from a certificate for money borrowed and which carries interest, as in *McGough v. Jamison*, 107 Pa. 336, and *Finkbone's Appeal*, 86 id. 368. The holding was that what would be a reasonable time was a question of law for the court under rules governing paper of that kind. That case and cases of that kind are not controlling if note is taken of the different nature of deposits in banks. Under present usages certificates of deposit are not generally employed for the purpose stated, but furnish evidence of deposits of money to be kept either for a stated time or indefinitely. Practically every village has its bank which invites deposits for safe keeping, and such banks generally have savings departments. Banks in receiving deposits may be mere custodians for safe keeping and come within the rule of *Campbell v. Whorisky*, 170 Mass. 63. In that case Mary Campbell began depositing her money with her second cousin in 1869, and in 1877 he gave her a memorandum of the amount received up to that time. The court held that a cause of action did not accrue until she demanded her money; that the element of trust entered into the trans-

action, and she was not bound to demand the money within the statutory period of six years, but thirteen years after the date of the memorandum was a reasonable time within which to make the demand. The court said that in receiving and keeping the money for the plaintiff the depository stood in the place of a savings bank. If Emerson's deposit was of such a nature as to require a demand within a reasonable time, the finding of fact was that business in Nome had been discontinued, and if a demand was to be made at the principal office of the defendant and the reasonable time governed by the statute of this State the action was not barred, so that the question is not involved. There were circumstances affecting the question of what would be a reasonable time, which is ordinarily a question of fact, and to adopt an arbitrary rule that it is a period fixed by the Statute of Limitations would be merely to double the statute, which would be unwarranted.

Counsel say that the delay in presenting the instrument and commencing the action, coupled with other circumstances, warranted the inference of payment and justified the judgment, but the trial court found that issue of fact against the defendant and that there had been no payment. There is also a suggestion that the judgment is right because the plaintiff did not testify, so that the defendant would have an opportunity to cross-examine him. There is no ground for the insinuation that his failure to testify justified an inference that he never deposited any money or that there was any valid defense to his suit. The certificate was a negotiable receipt for the money deposited, to be repaid on the return of the certificate properly indorsed. The facts as found by the trial court did not justify the judgment as a matter of law nor the affirmance by the Appellate Court.

The judgments of the Appellate Court and municipal court are reversed and the cause is remanded to the municipal court.

Reversed and remanded.

(No. 14515.—Judgment affirmed.)

THE FOREST PRESERVE DISTRICT OF COOK COUNTY, Appellant, vs. ANN E. KEAN, Appellee.

Opinion filed April 19, 1922—Rehearing denied June 8, 1922.

1. EMINENT DOMAIN—*time allowed for paying compensation begins to run when rehearing is denied.* Where a condemnation judgment is affirmed by the Supreme Court and a rehearing is applied for, the time allowed in the condemnation judgment for paying the compensation in the event of an appeal begins to run from the date the petition for a rehearing is denied by the Supreme Court, and not from the time the final order of said court is filed in the office of the clerk of the trial court.

2. SAME—*right to possession is abandoned if petitioner fails to pay compensation in time—costs.* The right to take property in a condemnation proceeding is conditioned on the payment of the compensation within the time limited by the judgment fixing the compensation, otherwise the petitioner abandons the proceeding and has no right afterward to take possession, and under the statute the property owner is entitled to costs reasonably incurred.

3. SAME—*abandonment of proceeding does not entitle property owner to costs of appeal.* Where a condemnation proceeding is abandoned because of the failure of the petitioner to pay compensation within the time required by the judgment, the property owner is entitled to recover all costs, expenses and reasonable attorney's fees paid or incurred in defense of the petition, but not to the costs and expenses of his unsuccessful appeal to set aside the judgment fixing the compensation.

APPEAL from the Superior Court of Cook county; the Hon. MARCUS KAVANAGH, Judge, presiding.

ADOLPH D. WEINER, EDWIN K. WALKER, and ROSS C. HALL, for appellant.

SHANNON & MORRILL, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellant, the Forest Preserve District of Cook county, filed in the superior court of that county its petition to ascertain the just compensation to be paid to the

appellee, Ann E. Kean, for 116 acres of land in the village of Spring Forest. The jury fixed the compensation at \$40,000 and judgment was entered on the award. Ann E. Kean appealed to this court, and the judgment was affirmed on April 21, 1921, and her petition for rehearing denied on June 9, 1921. (*Forest Preserve District v. Kean*, 298 Ill. 37.) The court in entering judgment as provided by the Eminent Domain act, (Harker's Stat. p. 2004,) giving the petitioner a right to enter upon the property and the use of the same upon payment of full compensation as ascertained, within a reasonable time to be fixed by the court, made this order a part of the judgment: "It is further ordered, adjudged and decreed that the payment herein provided to be made to the respondent, as above set forth, shall be made within sixty (60) days after the entry of this judgment, or, in the event an appeal is taken herefrom and the affirmance of this judgment on appeal, then within sixty (60) days after the entry of the final decision by the Supreme Court of Illinois on said appeal." A copy of the final order of this court was filed in the office of the clerk of the superior court on July 11, 1921, but the decision was final and took effect on the denial of the petition for rehearing on June 9, 1921, and the time for making payment began to run from that date. (*Chicago Great Western Railroad Co. v. Ashelford*, 268 Ill. 87.) Payment was not made within sixty days after the entry of the final judgment of affirmance by this court, and on August 11, 1921, Ann E. Kean filed in the superior court her petition to have her land declared free and discharged from any cloud, incumbrance, lien or interest by reason of the condemnation proceeding, and that the court should ascertain and allow to her all the costs, expenses and reasonable attorney's fees paid or incurred by her in the superior court and this court, as well as her taxable costs. On the same day the Forest Preserve District deposited the amount of the award with the treasurer of Cook county and took pos-

session of the land. It answered the petition, admitting the facts alleged but denying the power and jurisdiction of the superior court to deprive it of its title to the land. A hearing was had on the petition, and the court allowed \$3750 for reasonable attorney's fees, costs and expenses incurred and paid in the defense of the condemnation suit but denied the petition so far as costs in this court on the appeal were claimed. From the judgment this appeal was prosecuted, and the appellant has assigned errors and the appellee a cross-error.

The attorneys for the appellant asked the court to hold a proposition of law that it was without jurisdiction to determine that the condemnation proceeding had been abandoned and the district had not acquired any right, title or interest in and to the lands and property described in the petition. This proposition was contrary to the statute which governs and regulates the right to take private property for public use. The right to enter upon and appropriate to the public use private property does not depend upon an award or judgment fixing compensation but is conditioned upon the payment of such compensation, and the failure to pay deprives the petitioner of any right to the property or its possession and the proceeding is in law considered as abandoned. (*City of Chicago v. Barbican*, 80 Ill. 482; *Union Mutual Life Ins. Co. v. Slee*, 123 id. 57.) The right to take the property being conditioned on the payment of the compensation and payment not having been made within the time limited the district abandoned the proceeding and had no right afterward to take possession. (*St. Louis and Southeastern Railway Co. v. Teters*, 68 Ill. 144; *Schreiber v. Chicago and Evanston Railroad Co.* 115 id. 340.) The proceeding to take the property having been abandoned, the statute gave to the owner her costs and expenses reasonably incurred. *Chicago and Western Indiana Railroad Co. v. Guthrie*, 192 Ill. 579; *Village of Baylis v. Orr*, 291 id. 201.

The attorney's fees were necessarily incurred and the amount allowed was shown reasonable by the testimony, and that is a matter of which this court would also be a judge. It is not easy to see how ten days could have been occupied in the trial of an issue of fact as simple as the one involved in the case, but it cannot be said that the property owner was any more responsible in that regard than the petitioner or perhaps a complaisant trial judge. There are items of \$250 each paid to Harry Goldstein, F. K. Root and F. D. P. Snelling as retainers employed as witnesses to give opinions as to the value of the property, and they were afterwards paid \$400 each for testifying. It was not and is not claimed that it is improper to pay retainers and fees of so-called experts and there was no evidence that the amounts paid were not reasonable. The appellant therefore cannot complain that the amounts paid were allowed. There were other expenses incurred which were of a character to aid in the defense, and the only objection was that nothing should be allowed. There being no evidence that the amounts allowed were not reasonable there is no ground for reversing the judgment.

The cross-error assigned is that the court refused to allow attorney's fees, costs and expenses of the appeal to this court by the appellee. Such costs and expenses can only be recovered where they are provided for by statute, and the statute is not broad enough to include costs and expenses on appeal by a property owner prosecuted to reverse the judgment. The provision of the statute is for the payment by the petitioner of all costs, expenses and reasonable attorney's fees of the defendant paid or incurred in defense of the petition, and that does not include the costs and expenses of a removal to this court by appeal to set aside the judgment. The court did not err in refusing to allow the costs and expenses of the appeal.

The appellee has moved for an allowance of statutory damages on the ground that the appeal was taken for de-

lay. Section 23 of the Cost act (Harker's Stat. p. 1167,) provides that damages may be assessed, in the discretion of the court, if an appeal was prosecuted for delay. It is quite clear that this appeal was so prosecuted, but discretion is allowed to the court, and in view of the amount allowed by the superior court, which was very large in view of the very simple question tried, including the high price of opinions and other expenses which seem extravagant, the motion is denied.

The judgment is affirmed.

Judgment affirmed.

(No. 14461.—Reversed and remanded.)

THE BIG CREEK COAL COMPANY, Defendant in Error, vs.
CLARENCE H. TANNER, County Clerk, Plaintiff in Error.

Opinion filed April 19, 1922—Rehearing denied June 8, 1922.

1. PLEADING—*when allegations as to ownership are conclusions of the pleader.* In a bill to enjoin a county clerk from extending a tax against the complainant's interest in coal underlying certain tracts of land, allegations that the complainant has the mere right to mine the coal by virtue of certain leases set out in the bill and is not the owner in fee of the coal but that the fee is owned by persons residing on the land, are mere conclusions of the pleader, and neither the allegations of ownership nor complainant's construction of the leases is admitted by a demurrer to the bill.

2. MINES—*coal underlying the soil is real estate and may be conveyed as such.* Coal under the soil is real estate and is capable of being conveyed and held in fee by one person while the right to the surface is in another, and such a conveyance, whether by deed or lease, creates two separate estates in the land, each of which is subject to taxation as real estate and may be conveyed or devised or pass by descent.

3. TAXES—*right to mine coal acquired by lease is subject to taxation.* Under sections 6 and 7 of the Mines act (Hurd's Stat. 1917, p. 1985,) the right to mine coal acquired by lease is subject to taxation separate from the surface of the land, even though the lessee does not pay for the coal until it is removed from the mine and

settles with the land owners each month at a certain price per ton, and the assessment should be made separately as to each interest, the total assessment equaling the value of land increased by the value of the coal.

4. *SAME—right to use underground passages for mining purposes is taxable.* Although all the coal has been mined out and removed from a particular portion of a mine being operated on a lease, yet if the lease gives the lessee the exclusive and perpetual right to use the underground passages and entries in such unused portion for mining purposes, either from the premises described in the lease or from adjacent premises, such right is properly assessed to the lessee for the purpose of taxation while the lessee is mining coal.

WRIT OF ERROR to the Circuit Court of Fulton county;
the Hon. GEORGE C. HILLYER, Judge, presiding.

FLOYD F. PUTNAM, State's Attorney, for plaintiff in error.

BURNETT M. CHIPERFIELD, and CLAUDE E. CHIPERFIELD, for defendant in error.

Mr. JUSTICE DUNN delivered the opinion of the court:

The board of review of Fulton county assessed against the Big Creek Coal Company for taxation, coal rights in several tracts of land aggregating 488 acres, at \$14,640 full value, being \$30 an acre. The company filed a bill in the circuit court against the county clerk to enjoin him from extending the tax upon this assessment. He demurred to the bill, and the court having overruled his demurrer, elected to stand by it, whereupon the court rendered a decree enjoining the extension of the tax, and he sued out a writ of error.

The bill alleged that the Big Creek Coal Company is an Illinois corporation engaged in the business of mining and selling coal; that the board of review, after its organization in 1919, notified the company to appear before the board and show cause why certain real estate containing coal in place in the ground which had been severed from

the surface overlying the same by conveyance to the company should not be listed for assessment and taxation; that the company appeared and informed the board of review that it did not possess, own or control any real estate containing coal in place in the ground which had been severed from the surface by conveyance to it, but that such coal in place in the ground was owned in fee simple by the owners of the surface over it; that the company's only right to mine and remove coal on the tracts of land in controversy was wholly contingent and dependent upon its paying to the owners of the coal, after its severance and removal, a certain sum per ton as rent and royalty for each ton of coal removed, and that the company had not acquired title to and did not own or control the coal in place in the ground. The company produced and exhibited to the board of review the leases under which it was engaged in mining and removing coal from the real estate in question, but the board, after hearing the testimony, ordered the coal rights to be assessed. The bill set out five leases of separate tracts by different grantors under which the company was mining coal in the respective tracts. There is no substantial difference in the leases material to this controversy. They grant, lease and demise, two for the term of twenty-five years and three for the term of fifty years from the dates of the respective leases, the right to mine, take out and remove coal from or under the premises mentioned; the free and exclusive right to make underground roadways and passages through the premises connecting with other premises adjacent; the free, exclusive and perpetual right to use such underground passages and entries for mining purposes and in removing and conveying coal from the premises described in the instrument, or from any other premises adjacent thereto, to the mouth or mouths of the mines used in connection therewith; the right to prospect to ascertain the depth, character and extent of the coal deposits, and to use so much of the surface as necessary for the econom-

ical and profitable operation of mining, doing no unnecessary damage. The covenants on the part of the company required that an account should be kept of all the coal mined; that a monthly statement should be made to the grantor on or before the 20th day of each month of the number of tons mined in the preceding calendar month, and that payment should be made on the first day of the month succeeding each statement for all coal excavated, mined and removed, at the rate of three cents a ton of 2000 pounds, mine run. Each lease provided for a guaranteed minimum monthly rental, to begin shortly after the execution of the lease, and further provided that payments made under the guaranty unearned on account of coal mined should be deducted from the rent or royalty subsequently accruing in excess of such minimum rental. As to one tract the bill did not set out any title in the company, but averred that on April 1, 1919, it did not own any right, title or interest in the premises; that on that date the coal underlying the premises had been mined out and removed, and that there did not remain any coal in the ground subject to the payment of taxes.

The only question to be determined is, had the defendant in error an interest which was subject to assessment in the tracts of land in controversy? The demurrer admits the averments of fact in the bill but not the conclusions of the pleader. The averments that on April 1, 1919, the defendant in error was not the owner of any right, title or interest in the coal in place in the ground underlying the surface of the tracts described, and that on that date the real estate and the coal underlying the same were owned in fee simple by others, who were residing on the land and had paid all taxes assessed against the real estate, and that the defendant in error was not possessed of and did not own, control or have any interest in the coal underlying said real estate, were not admitted, for they were only the pleader's conclusion. The instruments through which the

title of the defendant in error was derived and the title conveyed by those instruments were admitted by the demurrer, but what title was conveyed was a question of law to be determined from the construction of the instruments, and the demurrer did not admit the construction averred in the bill.

Counsel for the defendant in error argue that there has been no severance of the coal from the surface; that it is not the owner of the coal in place under the ground, and that it has only the right to remove the coal upon payment of the amount stipulated in the instrument under which it claims title, as rent or royalty. Coal under the soil is real estate, capable of being conveyed and held by title in fee in one person while the right to the surface is in another. The owner of land may convey the coal and mineral rights and reserve the surface, or convey the surface and reserve the mineral. When such a conveyance is made two separate estates exist, and each may be conveyed or devised or will pass by descent, each is subject to taxation, and each is real estate. *Manning v. Frazier*, 96 Ill. 279; *Ames v. Ames*, 160 id. 599; *McConnell v. Pierce*, 210 id. 627.

Sections 6 and 7 of chapter 94 of the Revised Statutes provide that any mining right, or the right to dig for or obtain iron, lead, copper, coal or other mineral from land, may be conveyed by deed or lease, with like effect as deeds and leases of real estate, and when the owner of any land shall convey by deed, or lease, any mining right therein, such conveyance shall be considered as so separating such right from the land that the same shall be taxable separately, and any sale of the land for any taxes or assessments shall not include or affect any such mining right. We have held that such mining right is real estate and should be assessed for taxation separately from the other part of the land. (*Simmons Coal Co. v. Board of Review*, 282 Ill. 396; *In re Maplerwood Coal Co.* 213 id. 283; *Sholl Bros. v. People*, 194 id. 24; *Consolidated Coal Co. v. Baker*, 135

id. 545; *In re Major*, 134 id. 19.) In some of the cases cited there had been a conveyance by deed purporting actually to convey the coal, and in others a reservation of the coal from a deed conveying the land. In *Simmons Coal Co. v. Board of Review*, *supra*, the instruments under which the coal company claimed were similar to those under which the defendant in error holds in this case. It is not material whether the defendant in error be regarded as the owner in fee of the coal in place under the ground or holds some inferior interest in the land or the coal. There is no doubt that it is the owner of a mining right in the land which has been conveyed to it by deed or lease, and is therefore to be considered, under the statute, as separated from the land and taxable separately.

If the mining right conveyed to the defendant in error was not the ownership of the coal in fee but was only a leasehold interest, still the statute required it to be taxed separately, and it was required to be taxed as real estate under section 4 of the Revenue act, which provides for valuing real estate and declares that taxable leasehold estates shall be valued at such a price as they would bring at a fair, voluntary sale for cash. The same section provides that in valuing any real property on which there is a coal or other mine or stone or other quarry, the same shall be valued at such a price as such property, including the mine or quarry, would sell at a fair, voluntary sale for cash. In case of the conveyance of a mining right parties have created two distinct property rights in the land, which the statute requires to be assessed separately. The total assessment must equal the value of the land increased by the value of the coal, but the assessment should be made separately. *Consolidated Coal Co. v. Baker*, *supra*.

The bill contained no averment in regard to the title to the tract as to which it was averred that the coal had been mined out and removed, so that there remained no coal in the ground subject to taxation. It may be assumed, there-

fore, that the defendant in error held it by a lease similar to that by which the other tracts were held conveying to the defendant in error the exclusive and perpetual right to use the underground passages and entries for mining purposes and in removing and conveying coal not only from the premises described in the instrument but from any other premises adjacent thereto. Such conveyance was a part of the defendant in error's mining right in the land, and gave it the right to use the underground passages and entries for mining purposes in connection with the adjoining lands. (*Attebery v. Blair*, 244 Ill. 363.) The mining right in this tract, as well as the others in which the defendant in error was actively prosecuting the mining of coal, was properly assessed to the defendant in error.

The decree of the circuit court will be reversed and the cause remanded, with directions to sustain the demurrer to the bill.

Reversed and remanded, with directions.

(No. 14194.—Order affirmed.)

THE PEOPLE *ex rel.* Dean Fry, Appellant, *vs.* CHARLES H. GRAHAM *et al.* Appellees.

Opinion filed April 19, 1922—Rehearing denied June 13, 1922.

1. SCHOOLS—*when alteration in petition does not affect validity of organization of school district.* An alteration in the description of the territory in a petition for the organization of a community consolidated school district is properly held insufficient to authorize granting leave to file an information in *quo warranto* where the evidence conclusively shows that the alteration was made at the time the petition was prepared and that no change was made in the petition after it was signed.

2. Other questions in this case are controlled by the decision in *People v. Graham*, 301 Ill. 446.

APPEAL from the Circuit Court of Hancock county; the Hon. WILLIS F. GRAHAM, Judge, presiding.

LEE SIEBENBORN, State's Attorney, (HARTZELL, CAVANAGH, MARTIN & HARTZELL, and SCOFIELD, CALIFF & BELL, of counsel,) for appellant.

O'HARRAS, WOOD & WALKER, for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court:

Appellant presented to the circuit court of Hancock county his petition and motion for leave to file an information in *quo warranto* against appellees, requiring them to show by what warrant they claimed to hold and exercise the offices of president and members of the board of education of pretended Community Consolidated School District No. 305 in Hancock county. The district was organized under the act approved June 24, 1919, and embraced the territory formerly in school districts 222, 223, 224 and 225. A petition was presented to the county superintendent of schools for the organization of the district. An election was ordered by him, at which a majority of the votes were for organization of the district, and at an election ordered and held afterwards appellees were elected members of the board of education. The petition for leave to file the information alleged the act under which the district was organized is unconstitutional; that the elections were not conducted in accordance with the provisions of the Australian Ballot law and were void, and that the district was not compact and contiguous. By an amendment to the petition for leave to file the information it was alleged the petition for organization of the district was altered in a material part without the consent or acquiescence of the signers, after it had been circulated and signed. The alteration alleged was a change in the description of one tract of land. Affidavits in opposition to the motion for leave to file the information were filed on behalf of appellees, and the court denied leave to file the information. This appeal is prosecuted from that order.

All the material questions in this case were raised in *People v. Graham*, 301 Ill. 446, except as to the alleged alteration of the petition for organization of the district. That case was an appeal from an order denying leave to file an information challenging the validity of the organization of Community Consolidated School District No. 306 in Hancock county and the title of those persons acting as members of the board of education to the office, and all questions raised in this case, except the one referred to, were decided in that case contrary to the contention of appellant, and that decision must control here.

On the question of the alteration of the petition for organization of the district, it is alleged the petition shows on its face that the description "west half of the southwest quarter of section 31," which is not a part of the territory comprising the district, was altered to read "west ninety acres of the southeast quarter of section 31," which is in the district. Appellees filed affidavits,—one by the attorney who prepared the petition and one by the man who had it prepared and who circulated it and secured the signatures to it,—stating positively that the alteration was made at the time it was prepared and before it was signed by anyone. Those and other affidavits on the question as to when the alteration was made show conclusively that no change was made in the petition after it was signed, and justified the court in refusing leave to file the information on that ground.

All other grounds relied on by appellant were decided contrary to his contention in *People v. Graham, supra*.

The order of the court in denying leave is affirmed.

Order affirmed.

(No. 14638.—Decree affirmed.)

ETTA RICHARDS, Appellant, *vs.* CHARLES RICHARDS *et al.*
Appellees.

Opinion filed June 21, 1922.

1. *WILLS—conditions precedent and subsequent defined.* A condition subsequent is a condition annexed to an estate already created by a previous clause or instrument and by which said estate is to be prematurely defeated or determined, while a condition precedent is a condition upon the fulfillment of which an estate or interest is to arise or be created.

2. *SAME—conditions—intention of testator must be ascertained and given effect.* In determining whether a devise is upon a condition precedent or subsequent the first consideration is the intention of the testator as expressed in the language used by him, and having determined this intention it should be given effect.

3. *SAME—all conditions precedent must be performed before estate vests.* Where the condition for vesting the fee is that the devisee shall have saved up the sum of \$15,000 from the use of the estate, the fact of such accumulation to be established by proof before a circuit judge, the fee will not pass where the devisee accumulates said sum but makes no application to a circuit judge to invest him with the fee, and after the death of the devisee his representative will not be entitled to make such proof for him but the fee will go over to other devisees, as provided in the will.

APPEAL from the Circuit Court of LaSalle county; the Hon. EDGAR ELDREDGE, Judge, presiding.

COBURN & BENTLEY, and BOYS, OSBORN & GRIGGS, for appellant.

VINCENT J. DUNCAN, guardian *ad litem*, for appellee Charles Richards.

Mr. CHIEF JUSTICE THOMPSON delivered the opinion of the court:

February 9, 1907, Frederick Richards died testate, seized in fee of a large amount of real estate. The ninth clause of his will provided: "I give, devise and bequeath unto my son Charles Richards the use of the following described

real estate for and during the period of his natural life: [Describing about 600 acres of land in LaSalle county, Illinois.] * * * Provided, however, that when my said son Charles Richards shall have made, accumulated and saved the sum of fifteen thousand dollars (\$15,000) over and above any indebtedness which he may owe, then, upon making proof of such fact to any one of the circuit judges of the county in which said lands are situated, said judge may, and shall by his order or decree, invest him, the said Charles Richards, with the fee simple title to the real estate herein described and of which he is herein given the use; and in case the said Charles Richards fails to obtain the fee simple title to said real estate in the manner provided, then, upon the death of said Charles Richards, I give, devise and bequeath the remainder estate * * * to the children of the said Charles Richards in equal parts, share and share alike; * * * and in case of the death of my said son, Charles Richards, without leaving any child or children, * * * I give, devise and bequeath the said remainder estate * * * to my children." Similar provisions were made for other sons. February 28, 1918, Charles Richards died testate, leaving him surviving a widow, Etta Richards, appellant, and an eight-year-old son, Charles Richards, one of appellees. By the second clause of his will he gave his widow all of his personal property and by the third clause he gave her a life estate in all of his real property. The remainder he gave to his son in fee simple if he survived his mother, and in case of his death prior to that of the life tenant the remainder was devised to two brothers of appellant. Richards died owning a 148-acre farm in Livingston county, a home in the city of Streator, and considerable personal property.

The evidence shows that Charles Richards was a farmer and stock-dealer; that he resided in Streator, Illinois, until the fall of 1915, when he moved upon the lands described in the ninth clause of his father's will; that he had for

many years prior to his death been addicted to the excessive use of intoxicating liquor; that he had accumulated and saved property the value of which greatly exceeded \$15,000, and that he had never made application to a circuit judge of LaSalle county to invest him with the fee simple title to the real estate described in the ninth clause of his father's will and had never offered proof of the fact that he had accumulated and saved the sum of \$15,000.

Appellant filed her bill in the circuit court of LaSalle county, in which she prayed for a construction of the will of Frederick Richards, deceased, and that a decree be entered that Charles Richards, deceased, was at the time of his death seized in fee simple of the real estate described in the ninth clause of the will of Frederick Richards. To this bill the guardian *ad litem* who had been appointed for the minor son, who was made a party defendant, filed a general demurrer, which was overruled. Thereupon the guardian *ad litem* filed a formal answer, to which appellant filed a replication. The cause was referred to a master in chancery, who took proof and reported that the evidence supported the allegations of fact in the bill. To this report the chancellor sustained exceptions and entered a decree denying the prayer of the bill.

The principal question involved in this case is whether the conditions attached to the devise to Charles Richards were precedent or subsequent. It is conceded by appellant that the condition that he make, accumulate and save the sum of \$15,000 was a condition precedent, but it is contended that the condition that he make proof of this fact to one of the circuit judges was a condition subsequent, and that this condition could be performed by his personal representative or his heir after his death. Fearne defines a condition precedent as a direct condition which is not annexed to an estate created by a previous clause or instrument but upon the fulfillment of which an estate or interest is to arise or be created; and a condition subsequent

as a direct condition that is annexed to an estate or interest created by a previous clause or instrument, and upon the fulfillment or upon the breach of which, according to the form of the condition, such estate or interest is to be prematurely defeated or determined and no other estate is to be created in its room. (2 Fearne on Remainders, secs. 12, 13.) Redfield says: "Conditions in wills are either precedent or subsequent,—that is, the performance of the condition is required before the estate can vest or the failure to perform the condition will divest the estate. The distinction between these two classes of conditions is well enough understood by the profession, and still it is not always easy, in practice, to determine with certainty whether a condition was intended to limit the acquisition or the retention of the estate." (2 Redfield on Wills,—2d ed.—283.)

The first thing to consider in the construction of this will is the intention of the testator as expressed in the language used by him, and having determined this intention it should be given effect. (*Munie v. Gruenewald*, 289 Ill. 468.) The language used by Frederick Richards is plain and unambiguous and there is no need for construction. He names the conditions necessary to be performed by his son Charles in order to vest the son with the fee to the lands described, and then provides that if the son does not obtain the fee "in the manner provided," then the fee shall vest in the son's children. If two or more things are to be done before an estate vests, both or all must be done, otherwise the conditions will not be performed. (1 Shepard's Touchstone, 270; *Nevius v. Gourley*, 95 Ill. 206; *Becker v. Becker*, 241 id. 423.) The testator might have provided other methods for establishing the fact that his son had accumulated the necessary amount of money to entitle him to be invested with the fee to the lands in which he had been given a life estate, but he chose to provide one method, and made specific provision that if the money was not ac-

cumulated and the fact of its accumulation was not established by the one method provided, then the fee should pass to the son's children. All the conditions mentioned in the ninth clause of Frederick Richard's will are clearly conditions precedent, because they are conditions of acquisition of an estate and not conditions of retention, merely. Having failed to comply with these conditions Charles Richards did not become vested with the fee simple title to this property, and the real estate passed on his death to his minor son, Charles, and this minor son became vested with the fee simple title to the real estate described in the ninth clause of the Frederick Richards will by virtue of the provisions of that clause.

We are not without precedent in this conclusion. In *Cassem v. Kennedy*, 147 Ill. 660, the testatrix devised to her son a house and lot on condition that he settle down and become steady in his habits and marry, or if he remained a single man he was not to have the title until he arrived at the age of forty years. In either event the title was not to pass until the devisee had established to the satisfaction of the county judge that he was a reformed man or that he was over forty years of age. In that case this court held that the conditions were precedent and that the estate did not vest until the required conditions had been performed. In *Ransdell v. Boston*, 172 Ill. 439, a condition in a will whereby the life estate given the testator's son was to be enlarged to a fee in case he should become divorced from his then wife was held to be a condition precedent and the vesting of the fee thereby postponed until the condition was performed. In *Goff v. Pensenhafer*, 190 Ill. 200, the testator devised to each of his three children eighty acres of land to be thereafter selected for them, and the remainder of his lands after the selections were made was devised to his widow and others. This court held that the selection of the eighty-acre tracts by the testator was a condition precedent upon which the devise of

the remainder depended, and the testator having failed to make the selections the devise of the remainder failed. In *Jacobs v. Ditz*, 260 Ill. 98, the testator devised a farm to his son on condition that the son pay certain legacies and on the further condition that he file receipts for such payments with the county clerk, and it was held that both conditions were conditions precedent and that they must be performed before the estate vested. In *Brennan v. Brennan*, 185 Mass. 560, 71 N. E. 80, testatrix devised certain property to Brennan on condition that he take care of her and look after her while she lived, and the supreme judicial court of Massachusetts held that the condition was a condition precedent, and that his failure to perform the condition, although he had no knowledge of the provisions of the will until after the death of the testatrix, prevented the property devised from vesting in him. In *Markham v. Huford*, 123 Mich. 505, 82 N. W. 222, the testatrix gave to a grandson \$500 on condition that he show to the executors of her will, at the expiration of two years, that he was a reformed man. These conditions were held to be conditions precedent and the vesting of the legacy was held to depend upon a compliance with the conditions. In *Kerens v. St. Louis Union Trust Co.* (Mo.) 223 S. W. 645, 11 A. L. R. 288, the testator placed a fund in trust for the benefit of his son, and provided that the *corpus* of the fund should be paid to the son if he refrained from using intoxicating liquor for a period of five years and establish such fact by proof to the satisfaction of the trustee, and it was held that both conditions were precedent and must be fulfilled before the estate vested in the son.

Other questions are argued in the briefs, but we do not consider a decision of them necessary to a proper decision of this case, and so we refrain from extending this opinion to discuss them.

The decree of the circuit court is affirmed.

Decree affirmed.

(No. 14579.—Reversed and remanded.)

THE SPRINGFIELD DISTRICT COAL MINING COMPANY, Plaintiff in Error, vs. THE INDUSTRIAL COMMISSION *et al.*—
(JOSEPH ARCHER, Defendant in Error.)

Opinion filed June 21, 1922.

1. WORKMEN'S COMPENSATION—*burden is on claimant to prove recurrence of disability.* In a proceeding under paragraph (h) of section 19 of the Compensation act the burden is on the claimant to prove that his disability was due to the accidental injury and that since the original award was made his disability has increased and recurred as a result of the injury.

2. SAME—*when an award for recurrence of disability cannot stand.* An award for a recurrence of the claimant's disability can not rest on conjecture or surmise, and if the evidence not only fails to sustain the award but tends to show that the employee's condition is due to other causes having no connection with the injury the award cannot stand.

WRIT OF ERROR to the Circuit Court of Sangamon county; the Hon. E. S. SMITH, Judge, presiding.

T. W. QUINLAN, for plaintiff in error.

KERR, MACDONALD & MURPHY, for defendant in error.

Mr. JUSTICE FARMER delivered the opinion of the court:

This court allowed a writ of error to review a judgment of the circuit court of Sangamon county confirming an award made under paragraph (h) of section 19 of the Workmen's Compensation act. Joseph Archer, employed in the mine of plaintiff in error, was accidentally injured while engaged in his employment on September 9, 1919. He made application for an award of compensation, and on a hearing before an arbitrator April 5, 1920, he was awarded \$12 per week for 26 weeks for temporary total incapacity and \$4 per week for 52 weeks for partial incapacity. On March 19, 1921, he filed a petition under

paragraph (h) of section 19 claiming his injury had subsequently increased and recurred. A hearing on review of the award was had before the Industrial Commission on July 30, 1921, and on August 10 the commission filed its decision that Archer's disability had recurred and increased and awarded him \$4 per week for 338 weeks, beginning at the expiration of the period when the former award ceased. The record was removed by plaintiff in error to the circuit court by writ of *certiorari*, and that court confirmed the award of the commission.

It is contended by plaintiff in error that there was no evidence to sustain the award. Archer at the time of his accidental injury was wedging coal. The wedge flew out and hit him in the privates. He testified before the arbitrator, on the hearing of the application for the original award, that Dr. Wilbur visited him the night following the accident. He would swell up, and the swelling would go down again, two or three times a day. He was in bed three weeks and returned to work March 16, 1920, but could not stand it. Before he was hurt he loaded three or four cars a day and since the accident could load only one. He was pretty sore where injured. He worked three days in succession and had to quit. When he stooped to lift anything he had difficulty in straightening up again. He was sixty years old and had worked 139 days of the 180 days the mine worked, before his accident. He was off on account of sickness at different times, amounting to two months. He was not sick that long at any one time. The first time he laid off on account of sickness he could not make water. That was over a year prior to the hearing before the arbitrator. He went to Dr. McMahon for treatment. He testified he got down with his back,—“right across the small of the back, in the kidneys.” He went to Dr. McMahon for treatment for that trouble and got all right and went back to work. That was all the testimony in his behalf heard by the arbitrator

Dr. Henkel, a witness for plaintiff in error, testified he is a specialist in urology and kidney diseases. He treated Archer from December to March. He was suffering with pain in the right scrotum and difficulty in making water. He said he had been troubled for the last year in passing water, and that it caused him pain in his back at the time of passage, which the doctor called "referred pain." The doctor testified he ascribed Archer's condition to the condition of his prostate. The last time he saw him he was suffering as a result of an injury to the scrotum, plus his prostate condition. The pain was confined to the right scrotal sac, and some pain in the canal and general weakness. The condition of the prostate would have more to do with pain in passing water than the scrotal injury. There was no stricture or any laceration. There was no connection between the pain Archer complained of when he lifted, and the injury. He attributed the pain to the enlargement of the prostate gland, common in men of his age, and not the result of the injury. The prostate was not enlarged but was hard and fibrous and contracted along and narrowed the canal.

On the hearing of the petition claiming his disability had recurred and increased, Archer testified he went back to work after the hearing before the arbitrator and loaded an average of two cars a day. He worked three or four months and then quit because he could not work any more. He had pain when he shoveled or lifted. His privates swelled when he worked, but they were not swelling at the time of the hearing. He was swelling in the groin and wore a truss. The chief trouble was in his groin.

Dr. Herndon, on behalf of plaintiff in error, testified that on July 30, 1921, at the request of the insurance company he made a complete physical examination of Archer from head to foot. He found the abdominal wall thin and both inguinal rings relaxed. There was an enlargement of his prostate, but no sign of injury to the scrotum and no

evidence of previous injury. The condition of the inguinal rings could not have been caused by the accident. He complained of pain on both sides,—more up in the groin than the scrotum. The prostate condition would not be caused by the injury to the scrotum. The doctor was of opinion he had an incipient hernia.

It will be seen the evidence consisted entirely of Archer's testimony in his own behalf and that of two physicians called to testify by plaintiff in error. While the record very properly contains the testimony heard on the application for the original award, the correctness of that award is not here involved. We are concerned only with the award made on review under the petition of Archer claiming the injury had recurred and increased. The burden of proof was on Archer to establish that his disability was due to the accidental injury, and that since the original award was made his disability had increased and recurred as a result of his accidental injury. We have above set out the substance of all the testimony and need not repeat it in discussion. There clearly was, at most, but very slight evidence that Archer's condition at the time of the hearing on review, which was after the amendment of 1921 went into effect, was in any degree caused by the injury he sustained in the mine in September, 1919. His own testimony is inconclusive and indefinite, and the medical testimony does not furnish support for the award, but, on the contrary, tends to show Archer's condition was due to other causes than accidental injury. Considering the whole testimony, it can not even be said the disability was equally consistent with the accidental injury or with other causes having no connection with the injury. We have held before the amendment of 1921 authorizing circuit courts to review the facts, that the award must be based on facts proved and cannot rest on conjecture or surmise. *St. Louis Smelting Co. v. Industrial Com.* 298 Ill. 272; *Edehweiss Gardens v. Indus-*

trial Com. 290 id. 459; *Peterson & Co. v. Industrial Board*, 281 id. 326.

Because the evidence was insufficient to support the award the judgment of the circuit court is reversed, the award of the Industrial Commission set aside, and the cause is remanded for further hearing by the commission if further testimony is desired by the party interested.

Reversed and remanded.

(No. 14564.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. MARSHALL JORDAN *et al.* Plaintiffs in Error.

Opinion filed June 21, 1922.

1. **CRIMINAL LAW**—*when an indictment for robbery of money is sufficient.* An indictment for robbery need not describe the kind of money taken, and an allegation that the defendants made an assault upon William Merl and did steal from his person "the money of the said William Merl, to-wit, four dollars of good and lawful money of the United States of America and of the value of four dollars," is sufficient.

2. **SAME**—*taking of money after overcoming adversary in fight is robbery.* If as the result of a quarrel a fight occurs in which one of the parties is overcome, and the other then, without having formed the intention before the fight began, takes the money of his adversary, the offense of robbery is committed.

3. **SAME**—*what statement of co-defendant out of court is admissible for impeachment.* Where two defendants are being tried for the crime of robbery and one of them testifies that no money was taken but that the assault consisted merely of a fight between the witness and the party alleged to have been robbed, a contrary statement made out of court to the State's attorney, to the effect that the other defendant made the assault while the witness was a block away, is admissible for the purpose of impeachment.

4. **SAME**—*when instructions defining accessory before fact are proper in trial for robbery.* Where two defendants are being tried for robbery and the evidence tends to show that one of them committed the assault while the other took money from the possession of the party assaulted, it is proper to give instructions defining an

accessory before the fact and informing the jury that if either of the defendants is guilty and the other aided, abetted or assisted in the commission of the crime, the defendant so aiding, abetting and assisting is, in law, guilty as principal.

WRIT OF ERROR to the City Court of West Frankfort;
the Hon. WILLIAM G. MITCHELL, Judge, presiding.

JOHN E. CARR, GEORGE SAWYER, H. R. DIAL, and WILLIAM ROE, for plaintiffs in error.

EDWARD J. BRUNDAGE, Attorney General, ROY C. MARTIN, State's Attorney, and EDWARD C. FITCH, for the People.

MR. JUSTICE DUNN delivered the opinion of the court:
Marshall Jordan and George Carter prosecute this writ of error to reverse their conviction of robbery.

It is claimed that the indictment does not sufficiently describe the property taken or aver its ownership. The indictment consists of two counts, each of which charges that the defendants made an assault upon William Merl, and did steal, take and carry away from the person of said William Merl "the money of the said William Merl, to-wit, four dollars of good and lawful money of the United States of America and of the value of four dollars." Money in the possession of a person may properly be alleged to be the goods and chattels of that person, (*Collins v. People*, 39 Ill. 233,) and the allegation that the money taken was the money of William Merl is an averment that it was Merl's property. The statute declares that robbery is the felonious and violent taking of money or goods or other valuable thing from another by force or intimidation. The Criminal Code provides in section 6 of division 11 that every indictment shall be deemed sufficiently technical which states the offense in the terms and language of the statute creating the offense or so plainly that the nature of the offense may be easily understood by the jury, and section 9 of di-

vision 11 provides that no motion in arrest of judgment or writ of error will be sustained for any matter not affecting the real merits of the offense charged in the indictment. The language of the statute descriptive of the offense of robbery includes money, and the gist of the offense is the force and intimidation used in the taking. Whether or not, under the strict rules of pleading which prevailed at common law, it was necessary in the indictment to describe the kind of money taken, that rule has no application under our statute. Each count in this indictment charges the offense in the language of the statute so plainly that its nature can be easily understood, and the objection made does not affect the real merits of the offense charged. It was therefore not error to overrule the motion to quash.

William Merl was a coal miner, thirty-nine years old, who lived at Benton, Illinois. He went to West Frankfort in the forenoon of September 24, 1921, and after getting his dinner at a restaurant went to the house of Amelia Schitteck, where he remained for about fifteen minutes and got a drink of something which he did not know the name of, and also a bottle of what he called "dry beer." While he was there the plaintiffs in error, young men who were twenty-two years old, came in, together with three other young men. Carter asked Merl, according to the latter's testimony, for a dollar, but Merl refused his request, left the building and proceeded east along Dewey street. The plaintiffs in error followed him. Jordan overtook him and caught him by the coat. Merl jerked away and ran, Jordan following him. Jordan overtook Merl near the corner of Jackson street and knocked him down. Carter, who was following, came up and also assaulted and beat Merl. Carter took four one-dollar bills from Merl's pocket and left his pocket turned inside out. The defendants both denied taking any money from Merl. Carter testified that in front of Mrs. Schitteck's house Merl struck Jordan in the mouth and started to run and Jordan pursued him, but there was

no evidence of any quarrel or demonstration of either Jordan or Merl against the other except the blow in the mouth, which Merl denied and Jordan did not mention. Carter testified that Merl and Jordan first had a fight on Dewey street, about half a block from Jackson street, and that Carter caught them there and separated them; that Merl ran and Jordan caught him again at Jackson street, but Carter took no part in that fight. Other witnesses living in the neighborhood saw the fight, and from all the testimony it is clear that Merl was knocked down by Jordan and both of the defendants participated in beating him, and that upon his getting up his left-hand trousers' pocket was turned inside out. There was sufficient evidence on the part of the prosecution to justify the verdict, and it was for the jury to say which witnesses were entitled to credence.

It is claimed on the part of the plaintiffs in error that there is no evidence that the attack on Merl was made for the purpose of robbery but that his assault upon Jordan was the cause of the subsequent fight; that the fight was not for the purpose of taking Merl's money away from him, but that if any money was taken, the taking was an after-thought and was accomplished without any violence and without force or intimidation. The fact that the defendant had been reduced to a state of physical non-resistance before his money was taken does not relieve the crime of the quality constituting robbery. If, as the result of a quarrel, a fight occurs in which one of the parties is overcome, and the other then, without having formed the intention before the fight began, takes the money of the vanquished one, the offense committed is robbery.

On behalf of Jordan it is contended that he did not participate in Carter's taking of the money and had no intention of robbing Merl. He testified that there was no money taken; that Carter was not present at the assault upon Merl near the corner of Jackson and Dewey streets. He was asked whether he did not state to the State's attor-

ney, in the presence of the sheriff, that Carter was beating and fighting Merl while Jordan was a block away, and if he did not further say that he talked with Carter after the fight was over and Carter told him that he had taken four dollars out of Merl's pocket. Jordan denied making the statements, and the sheriff in rebuttal testified that he did make them. It was a question for the jury to what extent each of the defendants participated in each of the acts testified to, and their verdict cannot be disturbed on the ground that it is contrary to the evidence.

Complaint is made on behalf of Carter of the admission in evidence of Jordan's statement to the State's attorney. The evidence was clearly admissible for the purpose of impeachment. Jordan testified that Carter was not present and no money was taken, and his contradictory statement out of court was admissible to impeach his credibility as a witness.

Objection is also taken to two instructions given for the People, which gave the jury the statutory definition of an accessory before the fact and informed them that if either of the defendants was guilty of the offense charged in the indictment and the other aided, abetted or assisted in the commission of the crime, the defendant so aiding, abetting and assisting was in law guilty as principal. It is insisted that there is no evidence in the record on which to base these instructions. If the offense charged was committed, the evidence shows that it was Carter who actually took the money from the possession of Merl, and it was proper to inform the jury that, under those circumstances, if the other defendant was aiding and abetting he was equally guilty with the defendant who actually took the money.

The judgment of the city court will be affirmed.

Judgment affirmed.

(No. 14651.—Decree affirmed.)

ROSE M. LABADIE, Appellant, *vs.* EVERETT MORRIS *et al.*
Appellees.

Opinion filed June 21, 1922.

1. BUILDING RESTRICTIONS—*restrictive covenants are strictly construed.* Restrictive covenants as to real estate are to be strictly construed and all doubts are to be resolved in favor of the free use and enjoyment of property.

2. SAME—*when a garage is not included in restriction against barns or stables.* Buildings not contemplated at the time of the drawing up of a building restriction are not included within it, and a restriction made in 1891 against the erection of a stable, barn or privy will not be held to include a garage.

3. NUISANCES—*allegation that a garage is a nuisance must state facts—pleading.* Allegations in a bill to enjoin the erection of a garage as a nuisance, when stated as mere conclusions and without the allegation of specific facts showing wherein the building is a nuisance, are not admitted as true upon demurrer.

APPEAL from the Circuit Court of Cook county; the Hon. OSCAR M. TORRISON, Judge, presiding.

ALBERT E. ICELY, and JACOB G. GROSSBERG, for appellant.

JULIUS H. QUASSER, and ROBERT N. ERSKINE, for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

A bill was filed by appellant in the circuit court of Cook county praying that an injunction be entered restraining appellees from constructing a garage on certain property in Oak Park, in said county. A demurrer was filed to this bill and sustained by the trial court and the bill was dismissed. From that decree an appeal was prayed to this court.

From the allegations of the bill it appears that appellant is the owner of a part of lot 12, in block 6, in a certain subdivision in Oak Park; that a former owner of said premises (Reynolds) conveyed the same in 1891 to the immedi-

ate grantor of appellant, the deed containing a covenant or condition stating, in substance, that no stable, barn or privy should be placed upon the front 125 feet of said lot; that the former owner, Reynolds, at the time he conveyed the premises by the deed containing said condition, owned certain other property immediately adjoining said premises, and conveyed the same at about the same time to other grantees by deeds containing similar covenants or conditions. The bill represents that it is filed on behalf of appellant and of all others similarly situated, and alleges that these restrictions were for the purpose of providing a uniform plan for the regulation of the kind of buildings that should be erected, to insure the class, grade or character of the residential neighborhood in which the lots were located; that appellee Morris is now the owner of one of such parcels of land so conveyed with said restrictions, and has begun and intends to complete the erection of a garage on the part of his land subject to the restrictions, which type of building was not in general use at the time the restrictions were made, but that a garage is a building of the same general type, kind and character as a stable or barn, the terms being substantially interchangeable and convertible, the only distinction being that the term "garage" is more usually intended as a place for housing automobiles or motor vehicles; that a garage comes under the meaning of the covenants or restrictions. The bill also alleges that appellee the Harper & Butendorf Co. is a building contractor and has entered into an agreement with Morris to construct the garage. The bill further alleges that the completion and maintenance of the garage will be a violation of the aforesaid covenants and a violation of the general plan or scheme for the residential character of the neighborhood to be maintained, and will depreciate the residential character of the neighborhood and the value of the appellant's real estate, and will constitute a nuisance, tending to obstruct light, air and ventilation.

The question here involved is whether the restriction against stables, barns and privies would include also garages, which are buildings of a kind not in use at the time the restrictions were made. It has long been the rule of this court that restrictive covenants as to real estate shall be strictly construed and that all doubts are to be resolved in favor of the free use and enjoyment of property; (*Eckhart v. Irons*, 128 Ill. 568; *Hutchinson v. Ulrich*, 145 id. 336;) and this has been the holding in all the decisions of this court since the cases just cited, including the late case of *Boylston v. Holmes*, 276 Ill. 279, where the court said (p. 285): "Restrictive covenants of a character which hamper the free use of property are to be strictly construed against the restriction and all doubts should be resolved in favor of the reasonable use of the property." Under a somewhat similar restrictive covenant the Supreme Court of Massachusetts, in *River Bank Improvement Co. v. Bancroft*, Ann. Cas. 1912B, 450, (209 Mass. 217,) held that a garage used for the owner's automobile was not a stable, the opinion discussing the various definitions for "stable" and "garage," and stating that in construing restrictions of this kind the words should be understood as commonly used at the time the restrictions were imposed, (in that case in 1899,) and that it was not understood at that time generally that garages were stables, for stables were then understood to be buildings used for domestic animals, like horses or cattle. The reasoning of that case has been approved by various authorities. (See *Berry on Automobiles*,—3d ed.—sec. 1262; *Huddy on Automobiles*,—6th ed.—sec. 194; 2 *Pope's Legal Definitions*, 1512; 18 *Corpus Juris*, 393; *Asbury v. Carroll*, 54 Pa. Sup. 98.) The highest court of New York does not appear to have passed on this identical question, but we think a majority of the holdings by intermediate courts of that State have been in accord with the conclusion of the Supreme Court of Massachusetts. See *Beckwith v. Pirung*, 119 N. Y. Sup. 444; *Goldstein v. Ro-*

senberg, 181 id. 559; *Goldstein v. Hirsh*, 178 id. 325; *Sullivan v. Sprung*, 156 id. 332.

At the time the restriction here in question was incorporated in the deed garages had not come into common use. It will be noticed that the restriction here in question was in specific terms, and was not coupled with any general words, such as "other buildings of like character," and therefore the rule of *ejusdem generis* could not be invoked as to the meaning of this restriction, whereas general words of that character were used in some of the cases cited and relied upon by counsel for appellant. In *Bourgeois v. Miller*, 89 N. J. Eq. 285, the court laid down the rule that "it is well settled that in cases where the right of a complainant to relief by the enforcement of a restrictive covenant is doubtful, 'to doubt is to deny,'" pointing out that the reasons for the rule were, first, because restrictions of the lawful uses of property are against common right; and second, because restrictions, in the framing of which a subsequent purchaser has had no voice, ought to be so clear that by the acceptance of the deed that declares them he may reasonably be deemed to have understood and acceded to them. The bill alleges that the restrictions in this deed and in other deeds to land in the vicinity indicated an intention of the grantor to have a uniform plan with reference to buildings, so that it would continue as a high-class residential neighborhood. It is obvious that under the restrictions in the deeds it was intended that no barns, stables or privies should be within the restricted area. Had the original grantor intended that other buildings of like character should be kept from the restricted area it would have been a very simple matter to have so specified by apt words in the restrictions, but this was not done. Common observation shows that in these days garages are erected on the same lots with high-class, expensive homes, both in cities and in the suburbs, and often closer to the owner's house than the garage here will be to appellant's residence.

The bill alleges that the building of this garage will be a nuisance and therefore ought to be restrained. As to what constitutes a nuisance, it has been said that "every case stands or falls upon its own merits, and if the special facts establish the nuisance it will be so held although never so held before, and if they do not clearly establish the nuisance, the action must fail although that particular use of the property has been held a nuisance in a thousand instances." (2 Wood on Nuisances, 812.) It is clear that under the authorities the allegations of the bill that the building will be a nuisance, stated as a mere conclusion and without the allegation of specific facts, would not require such allegation to be admitted as true on demurrer. Later-day conditions not coming within the limitation, according to the intent of the parties, cannot be included within it. Although some of the later dictionaries define a garage as a stable, it seems obvious that the parties who placed these restrictions in the deeds in question did not intend to make a stable include a place for keeping motor cars, and that no such use could have been in contemplation of the parties at the time the covenant was inserted in the deeds. (*Goldstein v. Hirsh, supra.*) In the bill before us there are no allegations of noise, odors or other unpleasant features that will arise from the use of a garage on the premises sought to be occupied, and nothing in the bill, beyond the mere conclusion of the pleader, to the effect that the garage will constitute a nuisance and an annoyance.

We are of the opinion that the right to relief, by virtue of the restrictive clause in question, as to the garage must be held at least to be doubtful, and therefore, under the authorities in this and other jurisdictions, the remedy must be denied.

The decree of the circuit court will be affirmed.

Decree affirmed.

(No. 14542.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. ANGELO STATHUS, Plaintiff in Error.

Opinion filed June 21, 1922.

1. CRIMINAL LAW—*Supreme Court cannot decide conflicting testimony.* Where the testimony regarding the material facts in issue is directly in conflict it is the peculiar province of the jury to determine on which side of the controversy the truth lies, and in such case the Supreme Court will not substitute its opinion for that of the jury unless it is satisfied, from a consideration of all the testimony, that there is a reasonable doubt of guilt.

2. SAME—*when motion for a new trial will be denied.* Where the defense in a criminal case is based on the theory that the prosecution is a frame-up to put the defendant out of business, a motion for a new trial, after a verdict of guilty, is properly denied where the affidavit in support of the motion merely corroborates the charges as to the frame-up and where the delay in procuring the additional evidence is not satisfactorily explained.

WRIT OF ERROR to the Circuit Court of Madison county;
the Hon. J. F. GILLHAM, Judge, presiding.

HAROLD J. BANDY, for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, JOSEPH P. STREUBER, State's Attorney, and JAMES B. SEARCY, for the People.

Mr. CHIEF JUSTICE THOMPSON delivered the opinion of the court:

Edward Wilson, who lives at Brighton, went to Madison on May 1, 1921, and there called on John Venice, an acquaintance who was tending bar at a saloon owned by Sam Stathus and Nick Poulus. When Wilson left home he intended to go to St. Louis to buy a second-hand automobile and was carrying a large sum of money for that purpose. Immediately after he arrived at the saloon in Madison he began drinking moonshine whisky. By five

o'clock he was drunk and the saloon-keepers took him upstairs and put him to bed. Venice took \$250 from Wilson's pocket and kept it for him until the following morning, when he gave it back to him. After the money was returned to Wilson he went to another saloon in Madison, conducted by plaintiff in error, Angelo Stathus, and his partners, Gus Cheros and James Sharos. Here Wilson again imbibed too freely of moonshine and was soon helpless. Venice testified that some time after Wilson left the saloon where the former worked he followed him to the second saloon; that just as he entered the door Wilson was paying for a drink of whisky with a twenty-dollar bill; that shortly after this Cheros started the electric piano by dropping a nickel in the slot and began dancing with Wilson; that Angelo Stathus took Wilson's pocket-book while Cheros danced with Wilson; that there was a large amount of money in the pocket-book, and that he (Venice) protested to Stathus, but the latter kept the money. Sharos corroborated Venice in every detail with respect to the taking of the pocket-book. Wilson spent the night in a room over the saloon, and the following morning, finding himself without funds, he returned to Venice and borrowed five dollars with which to buy a ticket home. July 23, 1921, an indictment was returned by the grand jury of Madison county charging Angelo Stathus and his brother, Sam Stathus, with robbery of Edward Wilson. The State entered a *nolle prosequi* as to Sam, and Angelo was convicted of the larceny of \$235 from the person of Wilson. This writ of error is prosecuted to review the judgment entered on that verdict.

The principal contention of plaintiff in error is that the evidence does not establish his guilt beyond a reasonable doubt. It is contended that the conviction is the result of a story framed up by John Venice and James Sharos to get even with the Stathus brothers. No complaint was made to the police at the time of this alleged robbery and

no complaint of any kind was ever made by Wilson. After Venice had been discharged by his employers and after Sharos had had trouble with his partners and had severed his relations with them, Wilson was brought by Venice to the State's attorney and Venice told his story. About all Wilson knows about the affair is that he left home with money, that he was drunk for two days in Madison and that he returned home without money. Venice and Sharos are corroborated by Truman Willer, who is a grain-car inspector, living in East St. Louis. He testified that Wilson came into the saloon on the morning of May 2 singing and calling for a drink; that he received the drink and several more and that later he saw him dancing with one of the proprietors; that while he was dancing the witness saw plaintiff in error put his hand in Wilson's pocket and take from him his pocket-book, and that he made no protest and made no report to the police. These four witnesses are the only witnesses for the prosecution. All of them are keepers or patrons of illicit liquor dens, and the testimony of such people is always subject to grave suspicion.

Plaintiff in error testified that he did not remember whether Edward Wilson had ever visited his saloon, but denied that his partner, Cheros, danced with him, or that he himself took any money from Wilson; that Sharos had made threats to drive him and his partner, Cheros, out of business and to take the place for himself, and that Sharos first had them arrested for selling intoxicating liquor and thereafter had them indicted for this offense. Cheros testified to the same effect. Harry Brody, a merchant of Madison, testified that plaintiff in error bore the reputation of being an honest and law-abiding citizen.

The foregoing is all of the material and relevant testimony in the record. As we have said, the testimony of these dive-keepers and their patrons is subject to grave suspicion, and it is not possible for us to tell from the printed abstract of their testimony who is telling the truth. For

that reason the law has intrusted to the jury the duty of determining the weight and the credit to be given the testimony of the several witnesses. The jury had the witnesses before them and could judge their intelligence, credibility and manner of testifying far better than this court. Where the testimony regarding the material facts in issue is directly in conflict and irreconcilable, and its conclusion in such case of necessity depends largely upon the credit to be given the opposing witnesses, it is the peculiar province of the jury to determine on which side of the controversy the truth lies. In such case this court has no right to interpose by substituting its own opinion when the jury have honestly and according to their best light performed this duty, unless this court is satisfied, from a consideration of all the testimony, that there is a reasonable doubt of the guilt of the accused. (*Gainey v. People*, 97 Ill. 270; *People v. Delucc*, 237 id. 541.) The trial judge who saw and heard the witnesses has approved this verdict, and we see no reason for setting it aside.

With the motion for a new trial plaintiff in error filed the affidavit of Anthony Maggos, in which he states that he is engaged in conducting a restaurant in Edwardsville; that November 3, 1921, John Venice came to his place of business and requested him to act as interpreter for Venice, who was to testify as a witness in this case in the circuit court; that he told Venice that he did not need an interpreter because he could speak the English language; that Venice replied that he intended to act like a "greenhorn" in court and wanted it to appear that he could not speak the English language; that he agreed to act as interpreter; that Venice told him the story he expected to narrate on the witness stand; that he told Venice he did not believe the story was true; that Venice told him that he and James Sharos had determined to get rid of Angelo Stathus and that they had decided to tell this story, which would be strong enough to accomplish their purpose; that he has no

interest whatever in this proceeding, and that he did not inform plaintiff in error of the facts herein contained until after the conclusion of the trial and the jury's verdict. This story is rather remarkable, and his delay in reporting it to plaintiff in error tends to cast suspicion upon it. For this reason, and for the reason that the testimony, if produced on another trial, would not bring anything new into the case but would merely corroborate the charges of plaintiff in error and Cheros that this prosecution is a frame-up, the motion for a new trial was properly denied.

The judgment of the circuit court is affirmed.

Judgment affirmed.

(No. 14601.—Judgment affirmed.)

RALPH A. DRAIN, Appellee, vs. THE LAGRANGE STATE BANK, Appellant.

Opinion filed June 21, 1922.

1. SALES—*title cannot be transferred except by owner.* No one can transfer a better title than he has and no person can by his sale transfer to another the right of ownership in a thing in which he has not the right of property, except in the case of cash, bank bills, checks and notes payable to bearer or transferable by delivery in the ordinary course of business to a person taking the same *bona fide* and paying value for it.

2. SAME—*when real owner is estopped to assert his title against innocent purchaser.* Where the true owner of property allows another to appear as the owner of or to have full power of disposition over the property, so that an innocent third person is led into dealing with the apparent owner, an estoppel may operate against the true owner which will preclude him from disputing the existence of a title which he has caused or allowed to appear to be vested in another.

3. SAME—*when an innocent purchaser will be protected against vendor's lien.* Without regard to the terms of a contract of sale, an innocent purchaser will be protected where the appearance of ownership is in one while the title is really in another, and if a vendor delivers a chattel to the vendee before payment of the pur-

chase price and allows the vendee to have all the indicia of ownership, retaining a secret lien for payment, he cannot assert his right against a judgment creditor of the vendee without notice before a levy is made.

4. SAME—*mere possession of personal property does not enable possessor to give good title.* Possession of a chattel is but one of the indications of title, as possession may be delivered by the owner to a bailee, an agent or a servant, and one having possession of a chattel he does not own is not thereby enabled to give a good title so long as his possession is not accompanied with some indicium of ownership or the right to sell.

5. SAME—*contract of sale may be canceled by mutual agreement.* As between the parties to a contract of sale the party attempting to rescind must rescind *in toto* and return what he has received, but the parties by mutual agreement may cancel the contract and absolve themselves from its obligations upon such terms as they choose.

6. SAME—*when failure to return worthless check does not show that contract of sale was not rescinded.* If the seller of an automobile, upon finding that the check given to him as the first payment is worthless, declares the deal off, and the purchaser thereafter wrongfully takes possession of the car, which is later attached by his judgment creditor, the fact that the seller did not return the worthless check to the purchaser, who did not ask for its return, does not show that the contract of sale was not rescinded nor give rise to an estoppel against the vendor to assert title as against the attaching creditor.

7. SAME—*when judgment creditor of vendee cannot defend as an innocent purchaser for value.* Where the vendee, after a contract of sale is rescinded, wrongfully takes possession of the property and his judgment creditor levies an execution upon it, in a suit by the vendor for the conversion of the property the judgment creditor cannot defend as an innocent purchaser for value, where the vendor is not estopped from asserting his title.

8. SAME—*instructions stating abstract propositions not applicable to the evidence should not be given.* Instructions stating abstract propositions and which give no attention to the questions raised by the evidence and involved in the case should not be given.

9. SAME—*measure of damages is the fair market value of the property—instruction.* In an action of trover for the conversion of an automobile the measure of damages is the fair market value of the car; but an instruction advising the jury that the damages are measured by the retail market value of the property cannot amount to prejudicial error, as a motor vehicle is not the subject of wholesale and retail trade.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the County Court of Cook county; the Hon. HARRY C. MORAN, Judge, presiding.

JESSE E. ROBERTS, (ROBERTS & SWAIN, of counsel,) for appellant.

KNAPP & CAMPBELL, (JOHN R. NICHOLSON, of counsel,) for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Upon a trial in the county court of Cook county of this action of trover brought by the appellee, Ralph A. Drain, against the appellant, the LaGrange State Bank, for the conversion of an automobile, there was a verdict finding the defendant guilty and assessing the plaintiff's damages at \$1000. Judgment was entered on the verdict, and on appeal to the Appellate Court for the First District the judgment was affirmed. A certificate of importance was made and an appeal to this court allowed.

The facts which the evidence for the plaintiff tended to prove and which have been finally determined by the judgment of affirmance by the Appellate Court are as follows: The plaintiff, Ralph A. Drain, was the owner of a Moline-Knight automobile and lived at Monmouth, Illinois. He was expecting to enter the military service of the United States, and desiring to sell the automobile he drove it to Chicago and delivered it to the Schillo Motor Car Company at its place of business on South Michigan avenue. Ed. Schillo received the car but did not succeed in selling it and sent it to the garage of his father, Adam Schillo, on West North avenue. Soon afterward, on January 26, 1918, the plaintiff met Arthur J. Smith and told him that

he had a car for sale. The plaintiff, Smith and Anton Benson went to Adam Schillo's garage, where Smith examined the car and agreed to buy it for \$1000, and to pay for it \$100 cash and \$100 a week until it was paid for. The car was to remain at the garage until paid for, but the plaintiff told Schillo to let Smith have the car when he called for it. The plaintiff and Smith came down-town to the Brevoort Hotel, and Smith gave plaintiff his check for \$100 drawn on the LaGrange State Bank, the defendant, as a cash payment. Plaintiff deposited the check in the bank at Monmouth and it was presented and payment refused, and it was protested for non-payment on January 31, 1918, and returned to the bank at Monmouth. Plaintiff came back to Chicago in the early part of February and called Smith to the Brevoort Hotel, showed him the check and asked him what it meant. He told Smith if he could not make the first payment they should call the deal off, to which Smith assented. Plaintiff then called Ed. Schillo to come down to the hotel, where he showed him the check and told him it had been protested; that the deal was off and he was to notify his father, Adam Schillo, that the car was not to go out of that garage unless on a written order from him. This was about the first week in February, according to the recollection of Ed. Schillo, who testified that he gave his father notice as directed. At the time the deal was called off and the sale canceled Smith had not taken possession of the car, but he afterward took possession and took it away from the garage. Adam Schillo testified that his son told him over the telephone not to deliver the car to Smith, but at the time his son told him, Smith had taken it away. The time when the car was taken from the Schillo garage is not certainly fixed, but the first account of it after it was taken is when Smith, on February 19, drove it to the Keck garage at LaGrange and left it there. The plaintiff was informed that Smith had gone to the Schillo garage and taken the car, and he came to Chicago,

as he thought, about the middle of February. He asked Smith what he meant by going out and taking the car and told him to get it back immediately. Smith offered as an excuse that he was drunk when he took the car and that he expected to bring it back, and said that he would. Almost immediately after this talk with Smith the plaintiff went to Washington to report for duty in the military service and knew nothing more about the car until the last of April, 1918. On April 3, 1918, the defendant obtained a judgment against Arthur J. and Grace M. Smith upon a promissory note dated October 11, 1917. The next day an execution was issued on the judgment, and it was levied upon the car in Keck's garage in LaGrange. The sheriff advertised it for sale to be held on April 15, 1918. The day before the sale was to take place Smith telephoned Benson, who had been interested in the real estate business with the plaintiff, that the car was advertised for sale,—that they were going to levy on it and sell it. The next morning, before the time for the sale, Benson notified the president of the defendant that the car they were about to sell did not belong to Smith but to the plaintiff, and the president answered that he would not bother about it. Benson then called up Keck, at whose garage the car was to be sold, and told Keck the same thing, and then went to Swain, the defendant's attorney, and gave him the same information. The sale was postponed to April 25, 1918, when the car was sold for \$400, and the plaintiff being informed of the fact, on April 30, 1918, telegraphed the bank from Union Hill, New Jersey, where he was in the service, as follows: "Understand you have sold Moline-Knight thinking it belonged to A. J. Smith; you're absolutely wrong; I will hold you liable for all damages." This was before the proceeds of the sale had been paid to the defendant or the execution satisfied.

The question whether the judgment creditor levying an execution on property occupies the position of a *bona fide*

purchaser for value and whether there is a distinction in that respect between an attaching creditor and a judgment creditor is the subject of argument by counsel, but the question is of no importance in this case, since a *bona fide* purchaser for value from Smith would not have acquired any title to the car. Whatever the legal status of a judgment creditor may be, the levy of the execution upon the car gave to the defendant a lien to the extent, and only to the extent, of the ownership of Smith. It is a general, well established principle that no one can transfer a better title than he has. No person can by his sale transfer to another the right of ownership in a thing in which he has not the right of property, except in the case of cash, bank bills, checks and notes payable to bearer or transferable by delivery in the ordinary course of business to a person taking the same *bona fide* and paying value for it. (*Fawcett v. Osborn*, 32 Ill. 411; *Burton v. Curyea*, 40 id. 320; *Gibbs v. Jones*, 46 id. 319.) The purchaser of property wrongfully taken by his vendor from the true owner can obtain no more perfect title to the property purchased than the vendor himself possessed, and an innocent purchaser without notice of a wrongful taking can acquire no better title to property than his vendor had. (24 R. C. L. 374.) While that is true, an estoppel may operate against the person claiming what would otherwise be the better title, and this is based upon conduct of the true owner by which he allows another to appear as the owner of or having full power of disposition over property, so that an innocent third person is led into dealing with an apparent owner. The estoppel does not depend upon where the actual title is, but rests upon the act of the real owner, which precludes him from disputing the existence of a title which he has caused or allowed to appear to be vested in another. If a vendor of a chattel delivers it to a vendee or allows him to have possession of the chattel before payment of the purchase price and to have all the indicia of ownership, retaining, how-

ever, a secret lien for payment, he cannot assert his right against a judgment creditor of the vendee without notice before a levy is made. An innocent purchaser will be protected, without regard to the terms of the contract of sale, where the appearance of ownership is in one while the title is really in another or there is a secret lien. (*VanDuzor v. Allen*, 90 Ill. 499; *Chickering v. Bastress*, 130 id. 206; *Union Stock Yard and Transit Co. v. Mallory*, 157 id. 554.) Clothing another person with the indicia of ownership does not mean simply giving possession of a chattel. Possession of a chattel is one of the indications of title, but possession may be delivered by the owner to a bailee, an agent or a servant, and the mere possession of a chattel, if there is no other evidence of property given by the owner, will not enable the possessor to give a good title. Owners of chattels must frequently intrust others with their possession, and the affairs of men could not be conducted unless they could do so with safety, so long as the possession of the chattel is not accompanied with some indicium of ownership or the right to sell. (24 R. C. L. 375.)

Applying these doctrines to the facts of this case, Smith had no title to the car and could not transfer title, and the bank by virtue of its execution could not acquire title through him because he had none. There was no basis whatever for application of the doctrine of estoppel against the plaintiff, who was the owner of the car. When the plaintiff, with Smith and Benson, went to Adam Schillo's garage and the bargain was made for a sale of the car it was to remain in the garage until paid for, but Schillo was to let Smith take it when he called for it. That, of course, was with the expectation that the contract would be carried out, but Smith gave the plaintiff a worthless check, which was protested, and the contract was canceled and the sale rescinded before Smith had taken possession. The argument that the sale was not rescinded because the plaintiff did not return to Smith the worthless check is not applicable

except between the parties to a sale. The party attempting to rescind must rescind *in toto* and return what he has received to the other party if it is of any value or creates any liability. (*Dillman v. Nadlehoffer*, 119 Ill. 567; *Preston v. Spaulding*, 120 id. 208; *Rigdon v. Walcott*, 141 id. 649; *Babcock v. Farwell*, 245 id. 14.) Parties to a sale who are competent to contract may not only make their contracts to suit themselves, but may cancel a contract and absolve themselves from its obligations upon such terms as they choose by mutual agreement. Smith did not require the return of his worthless check, which was brought into the court at the trial, but the sale was rescinded, and when Smith took the car from Schillo's garage he excused himself that he was drunk and promised to bring it back. There was no estoppel.

It is said that the first instruction given at the instance of the plaintiff was wrong in stating that if Smith wrongfully obtained possession of the car and held it wrongfully and without authority from the plaintiff when it was converted by the defendant, the defendant was not in the position of an innocent purchaser for value and took no better title to the car than Smith had at the time of the conversion. The criticism stated is, that a judgment creditor stands in the position of an innocent purchaser for value. The hypothesis of fact that Smith wrongfully obtained possession of the car and held it wrongfully and without authority from the plaintiff necessarily led to the legal conclusion that the defendant took no better title than Smith had, and it was immaterial whether the defendant, as a judgment creditor, was in the position of an innocent purchaser for value or not. What was said in the instruction upon that subject was wholly immaterial.

Instructions 3 and 10 are said to be wrong. Instruction 3 stated that all that needed to be shown in an action of trover for the conversion of personal property is the ownership of the property by the plaintiff, that it came into

the possession of the defendant, and that the defendant converted it to his own use. It was of an abstract nature and gave no attention to the question raised by the evidence and involved in the case. It should not have been given, but it did no harm because the verdict could not have been different from what it was. The objection to instruction 10 is, that it stated that the measure of plaintiff's damages in case of recovery would be the retail market value of the property. The measure of damages was the fair market value of the car. While it might be error as to some species of property to advise a jury that the damages would be measured by retail value it could not have any influence on the verdict as to the car, which, like any other vehicle or animal, is not the subject of wholesale and retail trade.

The court refused to give to the jury this instruction asked by the defendant:

"The court instructs the jury as a matter of law that where one of two innocent persons must suffer as the result of a wrong committed by a third person, the loss must fall upon the one of the two parties who by his acts or conduct put it within the power of the third party to cause the loss."

The instruction was abstract in form, and it is not error to refuse such an instruction not applied to the evidence. If the jury attempted to apply the instruction to the evidence it could only benefit the defendant if they found that the plaintiff by his acts or conduct had put it within the power of Smith to cause the loss, and there was no basis in the evidence from which such an inference could be drawn. These are the only alleged errors worthy of attention.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(No. 14208.—Judgment affirmed.)

EDWARD WALSH, Defendant in Error, *vs.* THE CHICAGO RAILWAYS COMPANY *et al.* Plaintiffs in Error.

Opinion filed June 21, 1922.

1. NEGLIGENCE—*court will not weigh conflicting evidence on motion to direct a verdict.* On motion to direct a verdict the court will not weigh conflicting evidence but will merely inquire whether there is any evidence in the case tending to support the verdict.

2. SAME—*expert witness may be permitted to state that hernia was due to injury to the abdomen.* In a personal injury case an expert witness who made an examination of the plaintiff may be permitted to state that the hernia from which the plaintiff is suffering is due to an injury to the abdomen, where neither the question asked nor the answer given indicates that the hernia was caused by the injury alleged to have been received.

3. SAME—*whether injuries shall be exhibited to jury rests in discretion of court.* Whether injuries to the person shall be shown to the jury rests largely in the discretion of the trial court, and when the question is as to the extent of the wound or injury, it is the common practice to exhibit it to the jury so they may see for themselves its nature and extent.

4. SAME—*when instruction as to what may be considered in arriving at damages is proper.* In a personal injury case an instruction that the jury may take into consideration all the facts proved by the evidence, including "the nature and extent of plaintiff's physical injuries, if any, so far as the same are shown by the evidence; his suffering in body and mind, if any, resulting from said physical injuries; and such future suffering and loss of health, if any, as you may believe from the evidence," etc., is not improper in not requiring the jury to first find that the injury was caused by the negligence of the defendant, where such requirement is covered by another instruction.

5. SAME—*instruction that jury are to "be governed solely by the evidence" is not improper.* An instruction that the jury, in determining questions of fact, are to "be governed solely by the evidence" is not improper as permitting them to disregard the law in the case, where other instructions tell the jury they are to be governed by instructions of the court as well as by the evidence.

6. SAME—*when instruction is not prejudicial to defendant street railway company.* In an action against a street railway company for personal injuries to a pedestrian, an instruction that "the law does not give a street car company the right to the exclusive use

of the part of the street occupied by the street car tracks, but the street car company is required by law to operate its cars over its tracks with a due regard to the rights of the public in the use of the street," states a correct rule of law and cannot be regarded as prejudicial to the defendant.

7. EVIDENCE—*when witness may refresh his recollection from another's writing.* It is not necessary that the writing used by a witness to refresh his recollection be made by the witness himself or that it be itself admissible in evidence, provided that after inspecting the writing the witness is able to speak of the facts from his own recollection.

8. TRIAL—*argument should not be unreasonably restricted.* Attorneys, in arguing cases to the jury, must be allowed to make reasonable comments upon the evidence, and public justice requires that counsel should not be subjected to unreasonable restrictions in this regard.

WRIT OF ERROR to the Second Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. SAMUEL C. STOUGH, Judge, presiding.

HARRY P. WEBER, GEORGE W. MILLER, ARTHUR J. DONOVAN, and ARTHUR A. ANDERSON, (JOHN R. GUILLIAMS, and CHARLES L. MAHONY, of counsel,) for plaintiffs in error.

CHARLES C. SPENCER, and ARTHUR A. HOUSE, (NATHAN E. UTT, of counsel,) for defendant in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

Defendant in error, Edward Walsh, brought an action for personal injury against plaintiffs in error, the Chicago Railways Company and the Chicago City Railway Company, in the circuit court of Cook county, and after a trial the jury returned a verdict in his favor, on which judgment was entered for \$2500. The case was taken to the Appellate Court, where the judgment of the trial court was affirmed, and the cause has been brought here for further consideration on petition for *certiorari*.

Defendant in error, Walsh, a Chicago policeman in uniform, about 12:30 in the morning of September 1, 1916, was on his way to call his family physician for his son, who was very sick, and arriving at the intersection of North and Western avenues he was told by a citizen that a spare tire and wheel had been stolen from the rear end of an automobile then standing near the street intersection. Walsh, on examining the automobile to ascertain how the extra tire and wheel had been removed, passed around the rear of the automobile on the north and then on the east side, and stood, according to the evidence for defendant in error, with his right foot on the running-board and his left foot on the ground. The evidence on the part of Walsh tends to show that a street car of the Chicago Railways Company, without headlight burning and without giving any signal, approached from the north, and that when the car was close to Walsh the motorman opened the door, which, the testimony of defendant in error tends to show, let down the step, and Walsh was struck by the step on the left leg, thrown against the body of the automobile and then forward upon his stomach and rendered unconscious. Several people were gathered around the automobile at the time of the accident, and some of them placed Walsh in the automobile and he was taken to the police station and then home, where he was treated by Dr. Weil. The testimony of Walsh, as well as that of the doctor, was to the effect that he suffered with severe abdominal pains, and that about the third week after the accident an umbilical hernia appeared.

Walsh himself testified that he was thirty-eight years old and weighed about 240 pounds; that when injured he was standing, facing the automobile to the west and his left leg a little to the rear of his right leg, writing down memoranda as to the stealing; that as he bent over to look at the automobile he stood about two feet from the car track; that the step of the car hit him on the left leg near

the calf, and then the body of the car hit him and he was thrown forward on the pavement. He testified that he did not know the car was approaching before it hit him and did not hear any bell or see any light on it; that he was rendered unconscious and when he came to was sitting in an automobile.

Dr. Weil, who was at the street crossing at the time and saw the accident, testified that he lived in the neighborhood but had not known Walsh before; that he had just alighted from a North avenue car and was waiting for a Western avenue car; that after examining Walsh slightly at the place of the accident he afterwards went to his home, where he treated him; that later, when he saw that hernia had developed, he advised him to wear a belt; that he treated Walsh every month after the accident for about a year; that at the time of the trial Walsh had a fully developed umbilical hernia; that the hernia might be cured by an operation, but that such operations were not always successful; that the injury to the leg caused by the accident was practically completely cured in about a week. Several of the bystanders who saw the accident testified substantially to the same effect as did Walsh and Dr. Weil as to its causes and the circumstances surrounding it.

The motorman on the street car at the time of the accident was not working for the railway company but for the Crane Company at the time of the hearing in the circuit court. He testified that the headlight of the street car was burning when the car left the barns; that cars coming south on Western avenue always stop at North avenue because there is an intersecting street car line there; that when his car neared the intersection he noticed an automobile at the side of the curb, near the crosswalk, by which a couple of people were standing; that he first noticed the automobile when his car was at the elevated track, about a hundred feet north of North avenue; that he rang the bell several times right under the elevated structure; that when Walsh was

hit the car was running about four miles an hour and ran about four feet before it stopped; that the car was one of the pay-as-you-enter type. The testimony for the plaintiffs in error was to the effect that the step was stationary. The motorman testified that he saw Walsh standing near the rear of the automobile, which was facing south, and judged the automobile to be about five feet from the track; that witness thought his car had a lot of clearance, and that just as he was about to pass the automobile Walsh stepped right back,—maybe two steps,—and the front step hit his leg. On cross-examination this witness testified that he always rang his bell when he came to a crossing; that he rang it four or five times while approaching North avenue on that occasion. The person who was conductor at the time of the accident testified that he was standing at the rear of the car and did not see what happened.

There are some arguments in the briefs of plaintiffs in error to the effect that the testimony does not show that Walsh was standing with his right foot on the running-board of the automobile at the time of the accident, and counsel for plaintiffs in error also seem to argue that the evidence is to the effect that Walsh stepped out from the rear of the automobile just before he was hit. While defendant in error himself did not testify directly that he was standing with his right foot on the running-board of the automobile, at least the testimony of two witnesses who testified in his behalf was to the effect that he stood in that position at the time of the accident, and his evidence, as well as all the evidence in the record, was to the effect that he was standing on the side of the automobile nearest the street car, leaning over towards the automobile and taking memoranda as to the things that were stolen, at the time he was injured.

On behalf of plaintiffs in error three doctors testified as experts, in answer to hypothetical questions, that in their opinion the hernia could not have been caused by the ac-

cident. Dr. Leeming, one of these physicians, gave as a reason that if the hernia was suddenly brought on by violence it would be a case which would require the patient to be carried away on a stretcher. These doctors also testified that such a hernia might be curable by operation; that the operation was successful in the majority of cases, and though a serious and sometimes dangerous one to the individual was not a very serious operation surgically speaking. Two doctors besides Dr. Weil testified for Walsh as to his condition, Dr. Wallin stating that he examined Walsh on September 21, 1916, at his home, and found that he was suffering from a contusion on the left leg and showing evidence of an umbilical hernia.

It is first argued by counsel for plaintiffs in error that the trial court erred in not giving an instruction to direct a verdict in favor of the railway companies. This court has laid down the rule that on motion to direct a verdict the court will not weigh conflicting evidence but merely inquire whether there is any evidence in the case tending to support the verdict. (*Kelly v. Chicago City Railway Co.* 283 Ill. 640.) On the evidence given on behalf of defendant in error, without question the trial court did not err in refusing to direct a verdict in favor of plaintiffs in error.

It is strongly urged that the evidence does not justify the finding of the jury; that the verdict must necessarily be based on the conclusion that the hernia was the result of the accident. On the record before us there was evidence on which to base the jury's finding that the hernia was the result of the accident.

It is further objected by counsel for plaintiffs in error that the circuit court erred in permitting Dr. Weil to state, in answer to a question put to him, that the hernia was caused by an injury to the abdomen. The question asked or the answer made did not in any way specify whether the hernia was caused by this accident or by some other injury. That question was left to be decided by the jury.

Under the reasoning of this court in *Chicago Union Traction Co. v. Roberts*, 229 Ill. 481, and *Lyons v. Chicago City Railway Co.* 258 id. 75, we do not think any error was made by the ruling of the circuit court in this regard.

It is urged that the trial court erred in overruling a motion to exclude the testimony of Dr. Smith, who testified in behalf of defendant in error, that he had been examining physician for certain insurance companies and in the course of that work had examined Walsh in May, 1914, and that Walsh did not then have a hernia. On cross-examination of this witness it was shown that he had no independent recollection of so examining Walsh; that to refresh his recollection he had read memoranda kept by the company, a part of which he himself had made. It is objected that all of the memoranda was not made by Dr. Smith himself and therefore he should not have been permitted to refresh his recollection therefrom. It has been held by this court, in accordance with standard authorities, that it was not necessary that the writing used by the witness to refresh his recollection should have been made by the witness himself or that it should have been his original writing, provided that after inspecting the record he could speak of the facts from his own recollection. Neither is it necessary that the writing thus used should itself be admissible in evidence. (*Scovill Manf. Co. v. Cassidy*, 275 Ill. 462. See to the same effect, 1 Greenleaf on Evidence,—15th ed.—sec. 436; Jones on Evidence,—2d ed.—secs. 877, 878.) It is obvious from a reading of Dr. Smith's testimony that he was testifying as to his recollection as to Walsh's condition in May, 1914, after refreshing his recollection from the memoranda made at the time and kept by the company. Moreover, the main point urged in support of the motion to strike Dr. Smith's testimony is as to Walsh having hernia at that date. The other evidence in the record fully supports the conclusion that Walsh had no symptoms of hernia before the accident, and we do not see how any error, if

such there was, in admitting Dr. Smith's testimony in this regard could have been injurious to plaintiffs in error.

Plaintiffs in error urge also in this connection that error was committed on the trial of the case in allowing Walsh to exhibit the umbilical hernia; that this exhibition of his person could have had no other result than to arouse the prejudice of the jury; that counsel for plaintiffs in error did not deny on the trial that Walsh had a hernia. The record shows that when this offer was made as to showing the umbilical hernia the attorney for Walsh asked one of the attorneys for plaintiffs in error if he conceded that Walsh had a hernia, and counsel answered, "I don't concede anything." In view of the character of the injury and the question whether it was caused by the accident, as the jury found, we are of the opinion that it cannot be fairly held that in allowing damages of \$2500 the jury were influenced by passion or prejudice. On the trial of a case, the question whether the injuries to the person shall be shown to the jury is left largely to the discretion of the trial court. When the question is as to the extent of the wound or injury it is the common practice to exhibit it to the jury, so they may see for themselves its nature and extent. (*Springer v. City of Chicago*, 135 Ill. 552; *City of Lanark v. Dougherty*, 153 id. 163.) We find no error committed by the trial court in its ruling on this point.

Counsel for plaintiffs in error further insist that error was committed in the giving of several instructions to the jury on behalf of the defendant in error, especially instruction 15. First, in their original brief, they seem to object because this instruction states that the jury could take into consideration "all the facts and circumstances attending the injury as proven by the evidence before you,—the nature and extent of plaintiff's physical injuries, if any, so far as the same are shown by the evidence; his suffering in body and mind, if any, resulting from said physical injuries; and such future suffering and loss of health, if any, as you may

believe from the evidence before you in this case." Reading all their briefs together, we conclude that their chief objection to this instruction is that it did not require the jury to find that the hernia was caused by the accident before allowing damages for the various elements recited therein. It would be difficult to assume from the reading of this instruction, alone, that the jury would fail to understand clearly that any damages they might decide to allow Walsh were to be for an injury received by him through being hit by the street car. How any fairly intelligent jurymen could come to any other conclusion from this instruction we cannot understand. It is a familiar rule of this court that instructions must be considered as a series, and while instruction 15 did not state in specific terms that the injury must be shown by the evidence to have been caused by this accident, instruction 5 given for defendant in error did say specifically that the jury should find plaintiffs in error guilty if they believed from the evidence that Walsh was injured by or in consequence of the negligence of the plaintiffs in error, as charged in the declaration, that such negligence was the direct and proximate cause of the injury, and that Walsh was in the exercise of ordinary care before and at the time he was injured. In *Chicago City Railway Co. v. Taylor*, 170 Ill. 49, an instruction worded substantially as instruction 15 here objected to, was approved by the court, and the same rule on this question was practically approved by this court in later decisions. (*Cicero Street Railway Co. v. Brown*, 193 Ill. 274; *Chicago Terminal Railroad Co. v. Gruss*, 200 id. 195.) In view of the former holdings of this court with reference to similar instructions, and the wording of this instruction, the objection of counsel for plaintiffs in error as to the misleading effect of this instruction on the point in question seems to us not to be well taken.

Counsel for plaintiffs in error also object to the giving of instruction 7 for defendant in error because they claim

that in effect it authorized a recovery for mental injury, which they argue is very different from an instruction specifying mental suffering resulting from physical injuries. We do not think this point urged by counsel for plaintiffs in error is meritorious. In *Chicago City Railway Co. v. Taylor, supra*, the court, in discussing a similar instruction, said (p. 56): "The instruction complained of in substance directed the jury that in determining the amount of damages which the plaintiff is entitled to recover, the jury have the right to, and should, take into consideration the permanent disability, if any, caused by said injuries, and any future bodily and mental pain or suffering, if any, that the jury may believe, from the evidence, plaintiff will sustain by reason of injuries received," and it was held that the instruction was not erroneous, as authorizing a recovery for future mental pain or suffering. In our judgment the reasoning of the court in that case is a complete answer to plaintiffs in error's argument on the alleged objectionable features of instruction 7 given in this case.

Counsel for plaintiffs in error object to the giving of instruction 8 for defendant in error, which states among other things: "In determining any of the questions of fact presented in this case, you should be governed solely by the evidence. You have no right to indulge in conjectures or speculations not supported by the evidence." Counsel urge that this instruction limits the jury to the consideration of the evidence, alone, and that they should have been told that they should be controlled by the law as well as by the evidence. Several of the instructions given to the jury, particularly instruction 11 for plaintiffs in error, told the jury that they were to be governed by the instructions of the court as well as by the evidence, and that they were the sole judges of all questions of fact, and that the court did not by any of the instructions intend to state to them how they should find on any question of fact.

It is also objected that the court erred in giving instruction 9 for defendant in error, which reads:

"You are instructed that the only care and caution required of Edward G. Walsh was such conduct and care and caution for his own safety as a reasonably prudent and cautious person would have exercised under the same or like conditions and circumstances which surrounded him before and at the time of the alleged accident. He was not required to exercise extraordinary care or diligence."

Plaintiffs in error urge that the last sentence practically destroyed the rest of the instruction. This court said with reference to a similar criticism of an instruction in *West Chicago Street Railroad Co. v. McNulty*, 166 Ill. 203, on page 205: "The obvious and unmistakable meaning of the instruction is, that all the care required of the plaintiff was ordinary care, which is such a degree of care as ordinarily careful persons would exercise under similar circumstances." The same may be said with reference to the criticism here of instruction 9.

Counsel further argue that the court erred in giving instruction 13 for defendant in error, which reads:

"The law does not give a street car company the right to the exclusive use of the part of the street occupied by the street car tracks, but the street car company is required by law to operate its cars over its tracks with a due regard to the rights of the public in the use of the street."

It is argued that this instruction as worded, by innuendo would prejudice the jury against the company. This instruction laid down a correct rule of law with reference to the rights of a street car company in the use of the streets, and we cannot see how it would have prejudiced plaintiffs in error, as urged by their counsel.

Other instructions are objected to, but we do not find that the court seriously erred as to any of them and will not discuss them in detail.

Counsel for plaintiffs in error strenuously argue that reversible error was committed in permitting certain statements to be made by counsel for Walsh in his closing argument to the jury, over their objection, in which he referred sharply to the character of the expert testimony given in behalf of plaintiffs in error. Counsel for Walsh, while apparently conceding that these remarks as to the expert witnesses should not have been made, argue that counsel was at least partly justified in making them because of the statement made by counsel for plaintiffs in error in his opening argument to the jury regarding the testimony of Dr. Weil, a witness for Walsh. In referring to Dr. Weil's testimony as to the hernia being caused by the accident, counsel for plaintiffs in error said: "It depends entirely upon Weil,—the ubiquitous Weil,—who is present to look at the accident and who goes and attends to the case. Yes. He apparently didn't know enough medicine to know that he ought to have got this all black and blue, or something, in order to associate it with a hernia. Now, just take his testimony, if you will. When it is claimed by an eye-witness like Weil that this was a traumatic hernia, and when—I was going to argue that Weil wasn't telling the truth even about the light on the car. I thought I would call these doctors from different walks to tell you that Weil wasn't telling the truth about that any more than he is about the occurrence. I called Dr. Leeming. * * * My contention is that this hernia has no connection whatever with this accident." Counsel for Walsh claims that it was in answer to this argument of counsel for plaintiffs in error that he said in his closing address to the jury: "Now let us take Dr. Weil, whom counsel doesn't like because he attempts to cure people this street car company injures. He is not a Tenney or Leeming, to be sure; had all of these hospitals and colleges and universities on their tongues' end, and who are devoting their time, the evidence shows, at least to a great extent, not to curing sick people, as Dr. Weil

is, but swearing away their rights," etc. The testimony of Dr. Leeming given on the hearing shows that he gave a great deal of his time to the work of the street car companies and in advising with their doctors with reference to accident cases. This court has said more than once, that in arguing cases to the jury attorneys must be allowed to make reasonable comments upon the evidence. The interest of public justice requires that counsel should not be subjected to unreasonable restrictions in this regard. (*Illinois Central Railroad Co. v. Beebe*, 174 Ill. 13; *Chicago City Railway Co. v. Creech*, 207 id. 400.) Whether or not an objection should be sustained to remarks made in argument by an attorney in the trial of a case and whether his objectionable remarks should be held to be error may depend upon the preceding argument of opposing counsel. In *Plambeck v. Chicago Railways Co.* 294 Ill. 302, this court said in commenting on this question (p. 308): "We are influenced somewhat in our conclusion by the further fact that the foregoing argument complained of was in answer to remarks of plaintiffs in error's counsel that were not altogether legitimate and proper." Obviously the remarks objected to by counsel for the plaintiffs in error regarding Dr. Leeming and Dr. Tenney were called out by counsel's statement referring to Dr. Weil. While neither counsel should have made the remarks with reference to the expert witnesses that were made during their arguments to the jury, we are not prepared to say that reversible error was committed in the argument of counsel for defendant in error by making the remarks with reference to Dr. Leeming and Dr. Tenney.

We find no reversible error in the record, and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(No. 14589.—Judgment affirmed.)

THE FRANK W. WILLIAMS COMPANY, Plaintiff in Error,
vs. THE INDUSTRIAL COMMISSION *et al.*—(LEOPOLD
PALUCH, Defendant in Error.)

Opinion filed June 21, 1922.

1. WORKMEN'S COMPENSATION—*an award for disfigurement of hand does not depend on loss of earning power.* The statute does not require that there shall be a showing of loss of earning power before compensation can be made for a permanent and serious disfigurement of the hand.

2. SAME—*what does not show that capacity to earn has not been reduced.* Although the evidence in a proceeding for compensation for a disfigured hand shows that the injured employee is earning more at the time of the hearing than he earned when he was injured, it does not follow, as a proposition of law, that his capacity to earn has not been reduced.

WRIT OF ERROR to the Circuit Court of Cook county;
the Hon. FRANK JOHNSTON, JR., Judge, presiding.

GALLAGHER, KOHLSAAT, RINAKE & WILKINSON, for
plaintiff in error.

Mr. CHIEF JUSTICE THOMPSON delivered the opinion of
the court:

This writ of error is prosecuted by leave of court to review the judgment of the circuit court of Cook county confirming an award of the Industrial Commission awarding compensation to Leopold Paluch for a serious and permanent disfigurement to the hand.

Paluch was employed by plaintiff in error, which is a manufacturer of picture frames. He is married and has two children under the age of sixteen years. December 3, 1919, the end of the index finger on his right hand was cut by a rip-saw. Dr. John B. Jack testified that he treated the injured hand; that an X-ray examination revealed a fracture of the terminal phalange without displacement of

the fragments and without loss of any part of the bone; that the injured finger healed, and that on the date of the hearing there was a scar extending across the end of the finger, which was slightly discolored; that the nail-forming tissue was destroyed by the injury and that there remain two small fragments of nail, each about twice as large as a pin's head; that because of the loss of flesh from the end of the finger it has a slightly crooked appearance; that there is approximately a quarter of an inch of the finger gone; that there is no impairment of the joint function and that there is no involvement of the large nerves. It was the opinion of the physician that there was no loss of use of the finger. The arbitrator examined the injured finger and read into the record a similar description. Paluch testified that before the injury his hand was in good condition but that he is now unable to pick up small articles because the end of his finger is tender.

Paragraph (c) of section 8 of the Compensation act provides that compensation may be paid for any serious and permanent disfigurement to the hand, the amount fixed not to exceed one-fourth of the amount of the compensation which would have been payable as a death benefit if the employee had died as a result of the injury. The award in this case is the sum of \$14 a week for fifteen weeks, which is slightly more than one-fifth of the maximum award permitted by the statute. There is no contention that there is not a disfigurement and that the disfigurement is not permanent, but the contention is that it is not serious. Plaintiff in error argues that before a disfigurement can be said to be serious it must involve a loss of earning power. While the evidence shows that Paluch at the time of the hearing was earning more than he was earning at the time he was injured, it does not follow, as a proposition of law, that his capacity to earn has not been reduced. The statute does not require that there shall be a showing of loss of earning power before compensation can be made

for a disfigurement, and we are not authorized to read such a provision into the statute. The Court of Appeals of New York has sustained a similar provision of the New York law, (*Sweeting v. American Knife Co.* 226 N. Y. 199, 123 N. E. 82,) and its decision has been affirmed by the Supreme Court of the United States. (250 U. S. 596, 40 Sup. Ct. 44.) We agree with the Industrial Commission in its conclusion that the disfigurement to Paluch's hand is both serious and permanent, and the amount of the award seems to be within a reasonable limit.

The judgment of the circuit court is affirmed.

Judgment affirmed.

(No. 14655.—Decree affirmed.)

THE MICHIGAN CENTRAL RAILROAD COMPANY, Appellant,
vs. PATRICK J. CARR, County Collector, Appellee.

Opinion filed June 21, 1922.

1. TAXES—*general rule as to when court of equity will enjoin collection of tax.* A court of equity will exercise jurisdiction to enjoin the collection of a tax where the same is not authorized by law, where it is assessed upon property not subject to taxation and where property has been fraudulently assessed at too high a rate, but the bill must disclose facts showing fraudulent assessment.

2. SAME—*when bill to enjoin collection of tax against railroad company is subject to demurrer.* A bill to enjoin the collection of a tax against a railroad company for railroad track is subject to demurrer where it merely alleges that the tax was fraudulently assessed at too high a rate because the property was assessed by the Tax Commission as main track instead of second or side-track and does not allege facts showing why such an assessment is excessive or what the proper assessment should be, and in the absence of any allegations of fraud, the complainants who did not appeal from the decision of the Tax Commission cannot enjoin the collection of the tax.

3. SAME—*property need not be assessed in name of owner—corporation.* Under section 191 of the Revenue act the fact that prop-

erty is assessed in the wrong name or in no name is not such an irregularity as will in any way invalidate the tax, and a railroad company cannot enjoin the collection of a tax because certain of its property is assessed in the name of a fictitious corporation.

APPEAL from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding.

WINSTON, STRAWN & SHAW, (EDWARD W. EVERETT, of counsel,) for appellant.

ROBERT E. CROWE, State's Attorney, GEORGE E. GORMAN, and WILLIAM H. DUVAL, (HAYDEN N. BELL, of counsel,) for appellee.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

This appeal was taken to have reviewed the decree of the superior court of Cook county sustaining appellee's general and special demurrer to appellant's amended bill to declare unlawful, void and fraudulent certain taxes assessed against its railroad property and to restrain appellee from collecting or attempting to collect the same, and dismissing its bill for want of equity.

The following facts are stated in the bill: About 1852, by contract with the Illinois Central Railroad Company, appellant extended its lines to South Water street, in Chicago. The Chicago, Burlington and Quincy Railroad Company and the Chicago and Northwestern Railway Company are common carriers whose railroads extend up to the west bank of the south branch of the Chicago river, and it is approximately 3748 feet from the west bank of the river to the right of way of the Illinois Central Railroad Company. The four railroads purchased a strip for right of way between said points and built at joint expense thereon a railroad connection, which is referred to in the bill as the Sixteenth street side-track connection. Each railroad company owns an undivided one-fourth interest in the track

connection, which lies between Fifteenth and Sixteenth streets. Since 1852 the track connection has been used by the four railroad companies for interchange of cars and traffic. Appellant has never used said connection for any purpose other than exchange of freight from its railroad to connecting railroads and for delivery and receipt of freight to and from industries located thereon. It has never operated over the track connection as a main line and has never run its regular passenger or freight trains over the same. The tracks are side-tracks and turn-outs and should be so considered for purposes of taxing in Illinois. From the time the track connection was built until the same was assessed for taxation for the year 1920 it has usually and customarily been considered and treated by the four railroads and the officials of Illinois who assess and tax the same, as a railroad owned by said four railroad companies, each owning an undivided one-fourth interest therein. It has never, prior to 1920, been considered or treated by public taxing authorities as an independent railroad, the ownership and operation thereof always being considered and treated as in said four companies. It was never owned by a company or corporation known as the St. Charles Air Line Railroad Company, or any entity with a similar name. It was characterized as the St. Charles Air Line by the employees of said companies as a mere matter of convenience. The connection has 13,804 feet of track, is not a part and parcel of any main line or railroad of complainant, and should be treated as side-track and not as main line for the purpose of taxation. Within the time required by statute, appellant, as a corporation owning and operating a railroad in Illinois, returned sworn lists and schedules of its taxable property, and in said lists and schedules included its undivided one-fourth interest in the track connection as part of its railroad track. At no time, except in the year 1920, has said connection been returned by the companies owning the same as an independent railroad, and it was never

so considered by the Illinois officials who have taxed it, except in the year 1920. The lists and schedules of taxable property of complainant were made and sworn to within the time required by law and filed and delivered in accordance with the requirements of the law. It is further charged in the bill that about October 20, 1920, the Tax Commission, after having under consideration the question whether or not said track connection should be assessed as a main line railroad and a return filed showing the connection to be a separate railroad distinct from the railroads of the owners thereof, decided and determined that the same should be assessed as the St. Charles Air Line Railroad for the year 1920, and made the following finding and report: "That the tentative assessment of the property of the said St. Charles Air Line Railroad, as hereinbefore ascertained and fixed by the Tax Commission for the year 1920, be and the same is hereby confirmed, and that said assessment be certified to the county collector of Cook county as a separate and distinct piece of railroad property, and that the same be extended on the tax books of Cook county against said property designated as the St. Charles Air Line for the year 1920." The amended bill then charges that the track connection is assessed as main, second and side-track; that the county collector extended a tax, as directed by the Tax Commission, against said connection in and upon the following equalized valuations: main track, 3748 feet, \$297,675; second main track, 3748 feet, \$35,158; side-tracks, turn-outs, etc., 6308 feet, \$23,439; that the total tax extended against said property upon the valuation and now sought to be collected by the collector of Cook county amounts to \$19,203.15. The bill charges that said action is void, in excess of authority, unlawful and fraudulent because it violates the rights of appellant given by section 45 of the Revenue act, by which its rolling stock was required to be listed and taxed; that the method adopted and followed by the Tax Commission, as heretofore stated, un-

lawfully increased the tax of complainant upon its rolling stock; that said action is unlawful, unjust, lacks the uniformity guaranteed by the constitution, and is in excess of the authority of such commission vested in it by law, and is fraudulent for the reason that it denies to complainant rights given to it by the Revenue act to have its name as the real owner of said railroad track spread upon the public records; and that it violates its rights under various other sections of the Revenue act relating to notice to complainant of taxes which may become delinquent, and to have its undivided interest in said track assessed separate and apart from the other owners, etc.

There are other charges in the bill, to the effect that the act of the Tax Commission in assessing the track connection as a separate railroad and designating the ownership therein in a fictitious corporation, which had no corporate existence and had no interest of any kind or description in said connection, was void and unlawful and in excess of the jurisdiction of the commission, and was unlawful and fraudulent because said action unlawfully increased the taxes of complainant for said railroad track and constitutes double taxation upon complainant's property. There are no allegations in the bill, other than such bare statements or assertions, that show that the taxation on such track was increased by said action. It is nowhere charged in the bill that the track connection was customarily or at any time previous to 1920 assessed by the taxing authorities as side-track, turn-outs, etc., or that it never was assessed before as main track. It is charged that similar railroad track in Illinois was not assessed at the same rate nor in the same manner that the commission listed and assessed this track connection, but it is not stated how or in what manner other similar railroad track is assessed in Illinois. Appellant avers that it is ready, able and willing to pay the lawful tax on its property and that it has tendered to the appellee the lawful tax on its property, including this

connection, and that the appellee refuses to accept the same, the sum tendered being \$1060.21. There are no allegations whatever in the bill from which it may be determined what is the proper or lawful tax if it is not the tax assessed. There are no allegations in the bill showing what the assessment or taxes have been on the property heretofore, or any similar allegations from which it may be determined that the tax is excessive, and if so, how much, or whether excessive at all, except the mere statement that it is excessive, which is a mere conclusion or assertion and not the character of averment that gives this court jurisdiction to declare the tax illegal because so excessive as to be deemed fraudulent.

Under sections 42 and 43 of the Revenue act the right of way of a railroad company, main track and side-track or second track, and all turn-outs, station houses, depots, machine shops or other buildings, are assessed and taxed as real estate. Side or second-track and all turn-outs are assessed in the county, town, village, district or city in which the same are located. The value of the railroad track shall be listed and taxed in the several counties, towns, villages, districts and cities in the proportion that the length of main track therein bears to the whole length of the road in the State, except the value of the side-track or second track and turn-outs, and all station houses, depots, machine shops or other buildings belonging to the company, which shall be taxed in the county, town, etc., in which the same are located. Under sections 44 and 45 of the Revenue act rolling stock is assessed as personal property and taxed in the several counties, towns, etc., in the proportion that the length of the main track used or operated in such county, town, etc., bears to the whole length of the road used or operated by such persons, company or corporation, whether owned or leased by him or them in whole or in part. It is not questioned that the connecting line of railroad track is taxable and that it is taxable in Cook county, and in

Chicago if it is second or side-track, turn-outs, etc. The entire right of way is taxable in the same municipality. So far as the bill of complaint discloses, there is no difference in the valuation of right of way under side-tracks or second tracks than under main tracks, in the assessment by the Tax Commission or the taxing authorities. If there is any distinct difference in the valuation placed upon main tracks and second or side-tracks because of the fact, simply, that they are main or side-tracks, this bill does not disclose it by the allegation of the fact. If the tax on appellant's rolling stock or other property will be increased in the least by the fact that the track connection is assessed as a distinct and separate line of railroad, appellant's bill does not disclose it except by mere assertion and without allegation of the fact. In fine, there are not sufficient facts alleged in the bill to entitle appellant to maintain its bill for fraud or illegal action of any kind by which it is prejudiced or damaged by the assessment. In fact, the main charge in appellant's bill is that the Tax Commission, having the question before it for determination and decision, decided that the track connection is a main line railroad and ought to be assessed as a distinct and separate road as the property of the St. Charles Air Line Railroad, and not as second or side-track belonging to the four railroads aforesaid, and that by reason thereof it is excessively and doubly taxed, etc. The conclusion drawn from such allegation that it is thereby excessively and doubly taxed is not an allegation of a fact but a mere conclusion of the pleader, which is not admitted by the demurrer. It is true that a court of equity will exercise jurisdiction to enjoin the collection of a tax where the same is not authorized by law, where it is assessed upon property not subject to taxation, and where property has been fraudulently assessed at too high a rate. The bill does not disclose the existence of any such facts, and it discloses no right of appellant to maintain its bill for injunction. It is one of the official duties of the Tax

Commission to determine the character of said track connection,—whether it should be assessed as main, second or side-track, etc. If appellant desired to question its decision it had the right to do so by appeal, but the action of the commission cannot be enjoined for any reason shown in the bill.

In conclusion we may further state that it is not possible for this court to determine merely from the assessment of the various tracks of the connection that is set out in the bill that the assessment is excessive, or that the track assessed as main track would have been assessed any less if it had been described by the commission as second track. By the provisions of section 191 of the Revenue act the fact that property is assessed in the wrong name or in no name is not such an irregularity as would in any way invalidate the assessment or the tax. Under the several provisions of the Revenue act it need not cause any prejudice of or difficulty to appellant that its property is not assessed in its own name. It has a right to pay its taxes, or the proportion thereof assessed to it as aforesaid, and to obtain a receipt for the payment of its fourth of such taxes. In fact, there is no provision in the Revenue act that specifically requires property to be taxed in the name of the owner to make the tax valid. The other three owners of the track connection are not made parties to the bill. The use made of said connection by the other owners, whether as main, second or side-track, is not disclosed, and such use may have caused the Tax Commission to cause the track connection to be scheduled and taxed as a distinct and independent line of railroad. Its decision ought not to be disturbed until all the facts bearing on the question may be considered.

For the reasons aforesaid we hold that the superior court properly sustained the demurrer of appellee to the bill, and its decree is therefore affirmed.

Decree affirmed.

(No. 14600.—Judgment reversed.)

THE PEOPLE *ex rel.* Edward J. Brundage, Attorney General, *et al.* Defendants in Error, *vs.* JAMES BRUNO, Plaintiff in Error.

Opinion filed June 21, 1922.

PROHIBITION—*temporary injunction cannot be continued without preliminary hearing and notice—contempt.* A temporary injunction issued under section 22 of the Prohibition act cannot be continued in force beyond the period of five days from the time it originally issued unless the court sets the case for preliminary hearing and gives the defendant five days' written notice, and if no notice is given and no hearing had the defendant cannot be prosecuted for contempt in violating the injunction after the expiration of the five days. (*People v. Burchek*, 302 Ill. 437, followed.)

WRIT OF ERROR to the County Court of Sangamon county; the Hon. J. B. WEAVER, Judge, presiding.

EDMUND BURKE, and L. E. STONE, for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, C. F. MORTIMER, State's Attorney, and GEORGE C. DIXON, (H. E. FULLENWIDER, of counsel,) for defendants in error.

Mr. JUSTICE STONE delivered the opinion of the court:

The defendants in error, Edward J. Brundage, Attorney General, and C. F. Mortimer, State's attorney, on the 20th day of December, 1921, filed in the county court of Sangamon county an information against plaintiff in error and others, alleging that they were owners of certain premises in the city of Springfield; that plaintiff in error had sold intoxicating liquor on said premises and had otherwise so used them that they thereby became and were a common nuisance as defined by the Prohibition act. The information sought a writ of injunction against plaintiff in error and said premises. A motion for temporary injunction was filed, supported by the affidavit of William Stevenson that

he purchased from the plaintiff in error on November 22, 1921, one bottle of whisky and two drinks of whisky on the premises described in the information. A temporary writ of injunction was issued on this motion and the writ was served on the plaintiff in error. The writ of injunction was served on December 31, 1921, and the five days' notice required by statute was not at any time served upon him. On January 10, 1922, an information charging plaintiff in error with contempt for violation of the temporary injunction was filed, alleging that he had again sold liquor on said premises on January 7, 1922. Plaintiff in error was upon this information arrested, and on a hearing on the information contended, among other grounds for the dismissal thereof, that there was no injunction in force and effect at the time he was alleged to have violated it, and that no notice had ever been given him as required by the statute. These contentions were overruled and plaintiff in error held to be in contempt and given an opportunity to purge himself. He filed his sworn answer and certain affidavits, which, however, were held to be insufficient, and the county court held that he had not purged himself of contempt and sentenced him to pay a fine of \$500 and to imprisonment for a period of six months.

Plaintiff in error contends that section 22 of the Prohibition act, under which the injunction was issued, is unconstitutional; that the record shows that no notice was given him as required by said section. This question, on practically the same condition of the record, was before this court in *People v. Burchek*, 302 Ill. 437, where the statute was construed as requiring that the court granting a temporary writ of injunction shall set the case on preliminary hearing on whether the injunction issued shall continue in force, and give the defendant five days' written notice of the date of the preliminary hearing; that where no notice has been given the defendant of a preliminary hearing and no such hearing has been had, the court issuing the injunc-

tion has no authority to continue it in force beyond the five-day period. While in this case service of the writ of injunction was not had on the plaintiff in error until December 31, 1921, it appears that no notice of a preliminary hearing was ever served upon him. Under this state of the record what we said in *People v. Burckek, supra*, is controlling here, and the judgment must therefore, for the reasons therein given, be reversed. This being true, it does not become necessary to pass upon other objections raised.

Judgment reversed.

(No. 14575.—Reversed and remanded.)

THE LUMBERMEN'S MUTUAL CASUALTY COMPANY, Plaintiff in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.* Defendants in Error.

Opinion filed June 21, 1922.

1. APPEALS AND ERRORS—*Supreme Court cannot consider evidence not before the trial court.* In reviewing a decision the Supreme Court cannot exercise original jurisdiction by considering evidence not before the trial court, and if there has been an omission in the record it cannot be supplied by sending the omitted document to the Supreme Court, as errors or omissions in the record must be corrected in the trial court.

2. WORKMEN'S COMPENSATION—*transcript of hearing before arbitrator may be authenticated after it is filed.* The transcript of the hearing before the arbitrator must be filed with the Industrial Commission within the time limited by the statute, but it may be authenticated afterward, as the petitioner for the review has no power to compel the authentication within a specified time.

3. SAME—*when Industrial Commission has jurisdiction.* One who files a transcript within the time limited by statute cannot be prejudiced by the fact that there are disputes as to its correctness, but the Industrial Commission will take jurisdiction and after correction of the transcript the petitioner is entitled to a decision of the commission and of the circuit court on the corrected transcript.

4. SAME—*when circuit court should order withdrawal of record to make corrections.* Where a record is returned to a writ of

certiorari the circuit court has power to authorize the withdrawal of the record to make additions and corrections so as to make it speak the truth, and having that power the court should exercise it upon a showing that the return is incomplete or incorrect.

WRIT OF ERROR to the Circuit Court of DuPage county;
the Hon. ADAM C. CLIFFE, Judge, presiding.

GOOD, CHILDS, BOBB & WESCOTT, (DWIGHT S. BOBB,
and F. M. HARTMAN, of counsel,) for plaintiff in error.

MICHAEL KROSS, for defendants in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the
court:

Henry Zielski applied to the Industrial Commission for an adjustment of his claim for an injury suffered in the course of his employment by the Lombard Brick and Tile Company while shredding corn with a corn-shredder, which resulted in the amputation of his left arm. The plaintiff in error, the Lumbermen's Mutual Casualty Company, was joined with the Lombard Brick and Tile Company as an insurer against claims under the Workmen's Compensation act. There was a hearing before an arbitrator, at which the applicant and the brick and tile company stipulated that on November 19, 1920, the applicant was injured by an accident arising out of and in the course of his employment; that the employer had elected to provide and pay compensation under the Workmen's Compensation act and was operating its plant under the same; that no dispute existed between the applicant and his employer concerning the amount of compensation, and that the applicant was injured while shredding corn, which was a part of the duties of his employment. The plaintiff in error refused to join in the stipulation and objected to its being made or considered, on the ground that the election to come under the Workmen's Compensation act did not include farm labor-

ers and the injury was not covered by the act or by the policy of insurance against accidents within the act.

It appeared at the hearing that the Lombard Brick and Tile Company was in the business of manufacturing drainage tile, brick and hollow-ware made of clay; that it had a farm of clay lands of about 125 acres, on which it raised corn, hay, rye and wheat; that the applicant was a teamster engaged both in farm labor and the manufacture of tile, brick and hollow-ware, and that the employees were included in the same pay-roll whether working on the farm or in the brick and tile factory. The Lombard Brick and Tile Company filed an acceptance of the provisions of the Workmen's Compensation act and elected to provide and pay compensation in accordance therewith, and in the acceptance gave the number of its employees as fifteen and the nature of the employment "teamsters, icemen, laborers in tile and brick factory and at retail coal and lumber yard." The plaintiff in error is an insurance corporation and gave to the brick and tile company a policy of insurance covering obligations imposed upon the employer by the Workmen's Compensation act, and stating the locality and character of the business as follows: "Fuel and material dealer, including drivers, chauffeurs and their helpers, brick and tile mfg., ice, harvesting, storing and dealing." The arbitrator made an award, and the plaintiff in error and the brick and tile company petitioned for a review of the decision by the Industrial Commission. At the hearing before the commission the applicant moved that the petition for review be dismissed because the petitioners had not filed a correct stenographic report of the proceedings on arbitration, authenticated by the signatures of the parties or their attorneys. The attorney for the applicant had refused to authenticate the transcript and still refused to do so. By leave of the commission a transcript made by the official reporter of the commission was referred to the arbitrator, who authenticated it, and on consideration thereof the com-

mission affirmed the award. The plaintiff in error sued out a writ of *certiorari* from the circuit court of DuPage county, and the brick and tile company refusing to join in the petition for the writ, it was made a defendant. In the circuit court the applicant filed a general appearance, which was withdrawn by leave of court and a special appearance was then entered for the purpose of contesting the jurisdiction of the court. A motion was made to quash the writ of *certiorari* for want of jurisdiction because at the time of the hearing on review there had not been filed a stenographic report authenticated by the parties or the arbitrator, and also for the reason that the record returned to the writ was incomplete in omitting the insurance policy offered in evidence, under which liability for the award was claimed. The plaintiff in error moved the court for leave to withdraw the return to the writ of *certiorari* for the purpose of making corrections and additions thereto so as to show a correct and complete record of the proceedings before the arbitrator and the commission. The motion was supported by affidavits of attorneys for the plaintiff in error and the secretary of the commission, alleging that the record returned to the writ was incomplete and did not show all the proceedings; that on February 26, 1921, nineteen days after the decision of the arbitrator, the plaintiff in error filed with the commission a stenographic report of the proceedings on arbitration made by Charles G. Palmer, a reporter who was not an official reporter of the commission; that the attorney for the applicant refused to authenticate the transcript; that W. P. Scanlon, who was an official reporter of the commission, prepared a stenographic report and extensions of time were granted for the same, and his official report was authenticated by the arbitrator and filed on May 13, 1921, at the time of the hearing before the commission. The motion for leave to withdraw the return was denied. A motion was then made by plaintiff in error to remand the cause to the Industrial Commission for a trial *de novo*,

as provided by the amendment of 1921, and that motion was also denied. The court made a finding that prior to May 13, 1921, when the commission heard the claim on review, the decision of the arbitrator had become final; that the commission had no jurisdiction at that time to review the decision, and that the court was without jurisdiction to hear the cause on the writ of *certiorari*. Accordingly the writ was quashed and the proceeding dismissed, and a writ of error was allowed by this court.

The record filed as a return to the writ of *certiorari* showed the facts already stated, and also showed that the insurance policy upon which the claim of liability of the plaintiff in error was founded was in evidence but a copy of it was not in the record, which stated that the original policy was in the possession of the applicant. The parties attempted to supply that omission in this court by stipulating that the original policy should be sent by the secretary of the commission to the court, to be returned after the hearing and decision of the cause. The policy was sent to this court, but no consideration will be given to it. The court reviews the decision of the circuit court and does not exercise original jurisdiction by considering evidence not before the trial court. Errors or omissions in the record must be corrected in the trial court. The affidavits of the attorneys and secretary of the commission alleged material omissions in the return, among which was the fact that on February 26, 1921, within the time fixed by the statute, a transcript of the proceedings before the arbitrator was filed with the commission. It was made by Charles G. Palmer and bore the notation, "Outside reporter," and the attorney for the applicant refused to authenticate it. It is not within the power of a petitioner for review to compel authentication of a transcript within the time specified in the statute, and if the statute had been so interpreted it would be impossible for either an applicant or an employer to obtain a review if the opposite party or arbitrator desired to pre-

vent it. Not being able to obtain an authentication of the transcript, it appears that plaintiff in error procured a transcript from the official reporter of the commission, which was authenticated by the arbitrator but was materially defective, and when leave was asked to have it made complete, permission was denied. While a transcript must be filed within the time limited by the statute, the law is that it may be authenticated afterward, so that a hearing before the commission shall be upon a correct transcript. (*Bloomington, Decatur and Champaign Railroad Co. v. Industrial Board*, 276 Ill. 454; *Illinois Midland Coal Co. v. Industrial Board*, 277 id. 333; *People v. Andrus*, 299 id. 50.) A party seeking a review and acting in good faith complies with the law by filing a transcript within the time limited and cannot be prejudiced by the fact that there are disputes as to its correctness. When a record is returned to a writ of *certiorari* the court has power to authorize the withdrawal of the record to make additions and corrections so as to make it speak the truth, (*Lawrence Ice Cream Co. v. Industrial Com.* 298 Ill. 175,) and having that power, should exercise it upon a showing that the return is incomplete or incorrect. The return as filed showed that no transcript was filed with the commission within the time fixed by the statute, but the affidavits alleged that there was a transcript filed and within the time limited, and the court should have sustained the motion. If the return should be corrected and it should then appear that a transcript was filed on February 26, 1921, although not made by an official reporter and which the attorney for the applicant refused to authenticate, the Industrial Commission had jurisdiction and the plaintiff in error would be entitled to a decision of the court on the evidence in the transcript.

The judgment is reversed and the cause remanded.

Reversed and remanded.

(No. 14618.—Reversed and remanded.)

E. L. BEAL *et al.* Exrs. Appellees, *vs.* EDNA SUSAN HIGGINS *et al.* Appellants.

Opinion filed June 21, 1922.

1. *WILLS*—*trustees take quantity of estate necessary to carry out purpose of trust.* Trustees under a will will take that quantity of interest which the purposes of the trust require even though the legal estate is not in terms devised, and if a fee is required they will take a fee, while if a less estate will suffice, a less estate, only, will be vested.

2. *SAME*—*when children take as a class separate from other devisees.* Where a testatrix devises life estates in the income of her property, share and share alike, to her son, her daughter and the children of her son's wife, said children will take as a class equally with the individuals named, *per stirpes* and not *per capita*, taking together one-third of the devise.

3. *SAME*—*when trust estate will continue until death of life tenants.* Where a testatrix devises the income of her estate, both real and personal, to her husband, and provides that at his death her son, daughter and certain grandchildren shall also have life estates in the income, and where the subsequent provisions are void because of the rule against perpetuities, trustees appointed by the will to take charge of the renting of the property and the loaning of money will hold the legal title until the death of the last survivor of the life tenants.

APPEAL from the Circuit Court of Mercer county; the Hon. WILLIAM T. CHURCH, Judge, presiding.

PAUL J. GRAHAM, guardian *ad litem*, and GEORGE W. WERTS, for appellants.

WATSON & DUVAL, (DAVID J. KADYK, of counsel,) for appellees.

Mr. JUSTICE DUNN delivered the opinion of the court:

Ethzelda Higgins died on October 30, 1920, leaving a will, which was admitted to probate. Her executors filed their bill in the circuit court of Mercer county for a con-

struction of the will, and a decree was entered holding the will to be void and setting aside the probate of it. Upon an appeal of the infant defendants by their guardian *ad litem* this decree was reversed and the cause was remanded to the circuit court, with directions to enter a decree in accordance with the views expressed in the opinion. (*Beal v. Higgins*, 299 Ill. 229.) The opinion then filed sets forth the will and the facts in the case, and announced the conclusion that the decree of the circuit court was erroneous in holding the will to be void because the devises in the fourth, fifth and sixth clauses violated the rule against perpetuities. It was held that active duties were imposed upon the executors, who were made trustees by the last clause of the will, and that the second and third clauses of the will, together with the provisions of trust in regard to them, should be sustained. When the cause was re-instated in the circuit court the court entered a decree that the will was valid as to the first, second, third and last clauses, but that the fourth, fifth and sixth clauses were in violation of the rule against perpetuities and therefore void; that by virtue of the second clause Gilbert T. Higgins, the surviving husband of the testatrix, was entitled to the rents and profits of her property, both real and personal, during his life; that the beneficiaries named in the third clause constitute a class, the members of which will be determined at the expiration of the life estate of Gilbert T. Higgins, from which time the trustees shall divide the rents and profits derived from the property of the testatrix equally among the persons named in the third clause or the survivors of them, including any children of Maggie Higgins in being prior to the death of Gilbert T. Higgins, during their lives, and upon the death of any member of the class after the death of Gilbert T. Higgins, then the rents and profits shall be equally divided among the survivors of said class until the last member thereof shall die; that the trustees are invested with the title to all the property of the testatrix in fee

simple and should pay the net income from all the property of the testatrix in accordance with the previous findings, and that at the death of the last surviving member of the class created by clause 3 of the will, the fee simple title to all the property shall be indefeasibly vested in the heirs-at-law of the testatrix then living, as determined by the laws of intestate succession in force at the death of the testatrix.

The decree is erroneous. It was held on the former appeal that the terms of the second and third clauses were valid and should be carried out, together with the provisions of the trust in regard to them. The rest of the will was of no effect. The second clause gave to Gilbert T. Higgins, the surviving husband, the use, occupation, rents and profits of the real estate and the net income of the personal estate for his life. The third clause gave the use, occupation, rents and profits of the real estate after the death of Gilbert T. Higgins, together with all the net income of the personal estate after his death, to the testatrix's son, William Everett Higgins, her daughter, Myrtle I. Higgins, and the children of her daughter-in-law, Maggie Higgins, who was the wife of William Everett Higgins, share and share alike, and made no further disposition of the property of the testatrix. If the second and third clauses stood alone the estates created by them would be legal estates for life, but by the last clause of the will the executors are appointed trustees, with power to loan money, rent the real estate, collect the rent, pay the taxes and necessary expenses and fully carry out the provisions of the will. Under this clause the trustees took, by implication, a legal estate for the life of Gilbert T. Higgins and the lives of the persons named in the third clause of the will and of the survivor of them. Even though the legal estate is not in terms devised, the rule is that trustees under a will will take that quantity of interest which the purposes of the trust require. If a fee is required they will take a fee, and if a less estate will suffice, a less estate, only, will

be vested. It is not necessary that there should be a formal devise to the trustee, but, whatever the form of the devise, he will acquire an estate commensurate with the powers conferred and the purposes to be accomplished. (*Ebey v. Adams*, 135 Ill. 80; *Harvey v. Ballard*, 252 id. 57; *Emmerson v. Merritt*, 249 id. 538.) The duty of the trustees under the will, so far as it is sustained, is to carry out its provisions by managing the personal property, renting the real estate and collecting the rents, paying the taxes and the expense of administering the trust and distributing the net income in accordance with the provisions of the second and third clauses of the will, and this duty will terminate with the life of the survivor of the life tenants. This period is therefore the limit of the estate of the trustees. The remainder after the expiration of the life estates is not disposed of by the will and is not affected by the trust. It descended as intestate property, immediately on the death of the testatrix, to her son and daughter in fee. The devise in the third clause, "to my son, William Everett Higgins, to my daughter, Myrtle I. Higgins, and the children of my daughter-in-law, Maggie Higgins, share and share alike," is not to be regarded as a gift to a class, the members of which are to be determined at the death of the life tenant, Gilbert T. Higgins. We have held that the rule in regard to a devise to an individual named or to several named individuals, and to the children of another, share and share alike, is, that the children in such a devise are to be considered as a class and to take under the will equally with the individuals named, *per stirpes* and not *per capita*. *Dollander v. Dhaemers*, 297 Ill. 274; *Palmer v. Jones*, 299 id. 263.

The decree should have found that the trustees were vested with the legal title to all the property, real and personal, of the testatrix during the life of Gilbert T. Higgins, William Everett Higgins, Myrtle I. Higgins and the chil-

dren of Maggie Higgins in being now or at any time during the life of Gilbert T. Higgins and during the life of the survivor of such persons; that Gilbert T. Higgins is entitled to the net income of all the real and personal property during his life, and after his death William Everett Higgins and Myrtle I. Higgins and their respective heirs and assigns will each be entitled to one-third of the net income during their respective lives and the life of the survivor of them and during the lives of the children of Maggie Higgins in being during the life of Gilbert T. Higgins and the life of the survivor of such children, and after the death of either, his or her heirs and assigns will be entitled to one-third of the net income until the termination of the last of said lives; that the children of Maggie Higgins living at the time of the death of Gilbert T. Higgins will after his death be entitled to one-third of the net income, to be received by them share and share alike during their lives; that William Everett Higgins and Myrtle I. Higgins and their respective heirs will be entitled to receive the share of the net income of any child of Maggie Higgins who may die until the death of the survivor of William Everett Higgins, Myrtle I. Higgins and the children of Maggie Higgins living at the death of Gilbert T. Higgins. Upon the death of such survivor the trust will terminate, and the legal estate in fee in the remainder now vested in William Everett Higgins and Myrtle I. Higgins will come into possession of them or of their heirs or assigns.

The decree is reversed and the cause remanded to the circuit court, with directions to enter a decree in conformity with this opinion.

Reversed and remanded, with directions.

(No. 14620.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. CLINTON BOUCHER, Plaintiff in Error.

Opinion filed June 21, 1922.

1. CRIMINAL LAW—*what may be considered by jury in determining truth from conflicting testimony.* Where the testimony is conflicting and the jury are required to decide as to the credibility of the witnesses in reaching a verdict, they may consider not only the actual words used by the witnesses but their appearance and conduct on the witness stand, their interest in the case, the candor with which they testify, the accuracy of their observation, their opportunities of knowledge and the circumstances surrounding the occurrence to which they testify.

2. SAME—*when Supreme Court will not reverse judgment of conviction.* The Supreme Court will not reverse a judgment of conviction on the ground that it is contrary to the evidence unless it clearly appears that there is a reasonable doubt of the defendant's guilt, and it cannot be said that there is a reasonable doubt merely because the evidence is contradictory or because more witnesses testify in favor of the defendant than in favor of the prosecution.

WRIT OF ERROR to the Circuit Court of Franklin county;
the Hon. J. C. EAGLETON, Judge, presiding.

G. A. HICKMAN, and W. C. CHOISSER, for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, ROY C. MARTIN, State's Attorney, and FLOYD E. BRITTON, for the People.

Mr. JUSTICE DUNN delivered the opinion of the court:

On an evening in December, 1920, the drug store of Bert Fox, in Zeigler, in Franklin county, was entered about seven o'clock by two or more men, who robbed the cash register of about \$70. At the May term of the circuit court,

Clinton Boucher and Charlie Boucher, brothers, were indicted for the robbery. They were tried at the November term. Charlie Boucher was acquitted and Clinton Boucher was found guilty. He was twenty-five years old and was sentenced to imprisonment in the Illinois State Reformatory. This writ of error is prosecuted to reverse the judgment on the single ground that it is not sustained by the evidence.

The People's case rested upon the identification of the plaintiff in error. The commission of the crime was shown by the testimony of George Betts, the clerk who was in charge of the store. He testified that about half an hour before the robbery Charlie Boucher came into the store to buy a small vial of perfume and asked where the "big doc" was, referring to another clerk in the store, and Betts told him that he had gone home for a few days. About a half hour later another man, who was neither of the defendants and whom Betts did not know, came in and asked for a dime's worth of bismuth. Betts was behind the counter in the front end of the store, and when he turned to get the bismuth the supposed purchaser placed something which he held in his hand against Betts' back and said to him, "Put them up and walk around behind the prescription case." Betts put his hands up and walked behind the prescription case, where the man, with the assistance of another who had come in, blindfolded Betts, tied his hands behind him, tied his ankles together, took him into the rear of the store and laid him, face downward, on a bed. Betts did not know how many persons there were, but there were more than one. While he was lying there he heard the men taking the change out of the cash register and heard the jingle of the money. Back of the store were some rooms partitioned off by a beaver board partition extending only part way to the ceiling. Beyond this partition Mr. and Mrs. Patterson lived. Betts felt someone step over him and go through this partition. He did not hear anything said by

the robbers until just before they were leaving, when one of them said, "Hurry up, Clint," though Betts was not sure of the name.

Goldia Patterson lived with her husband in the rooms back of the store and testified that there was an opening between the drug store and their rooms. The door was nailed up. About 7:15 in the evening of the day of the robbery she heard the noise and opened the door to the bedroom, which was the next room to the drug store. Clinton Boucher, the plaintiff in error, whom she did not know and had never seen, was in the bedroom and had pulled the partition down. He pointed a gun in her face and told her to go back. She asked him what he wanted, and he again told her to go back, and when she asked him what he meant he repeated his command and she went back. There was no light burning in the room, but it was not very dark and she could see him distinctly. There was a light burning in the drug store and the partition extended but little more than half way to the ceiling. He had a revolver in his hand, which he pointed at her. She saw him after that in the Benton jail. There were several there with him and she was able to identify him in the jail. The date of the robbery was not fixed by the evidence for the People except that it was in December, 1920. Mrs. Patterson testified that the man wore a brown suit and a brown hat.

The defense was an alibi. Weldon Parker testified that he lived at Herrin on December 7, 1920, and saw the plaintiff in error there on that evening. The plaintiff in error got Parker, who was driving a service car at that time, to take him to Hurst about five o'clock. He took him and they arrived at Hurst about six o'clock, where Parker left Boucher at the latter's brother's. There was a girl with him and Parker did not see him any more that night.

Frank Boucher, a brother of the plaintiff in error, lived at Hurst and testified that Clinton came to his house on the evening of December 7, while his wife was getting

supper, in the neighborhood of six o'clock, and had supper there. Marie, whom Clinton married on December 17, was with him, and Frank remembered the date because Clinton said that he and Marie were going to get married on the 17th and spoke about that day as being the 7th. Frank testified that Clinton wore a green hat and a suit of some kind of novelty goods, by which he said he meant a suit with about seven or eight different colors; that after supper they sat around and talked awhile, and the plaintiff in error said he had better be going,—he wanted to catch a train. It was between seven and eight o'clock when they left and he did not know where they went. Frank lived ten miles by rail from Zeigler.

Pearl Boucher, Frank's wife, testified to the same thing,—that plaintiff in error came there about six o'clock in a service car and left right after supper to catch a train for Herrin; that his intended wife was with him and they were going to Herrin from there.

T. O. McGrill, a locomotive fireman, testified that he had worked for the Missouri Pacific Railroad Company for four years and stayed at the Y. M. C. A.,—a railroad eating house at Bush; that he saw the plaintiff in error on December 7, 1920, about 8:30 in the evening, in the depot at Bush. His wife was with him. The depot is used by both the towns of Hurst and Bush. The date was fixed in his mind because he wanted to see the plaintiff in error about an automobile accident, and he talked with him about that at the depot for ten or twelve minutes. The plaintiff in error went to Herrin from there. McGrill saw him get on the train.

The plaintiff in error testified that he lived at Hurst and that Weldon Parker drove him and his wife on December 7 from Herrin to Hurst to his brother's, where they arrived about six o'clock and stayed until 7:40; that he went from there to the home of V. L. Leckner, a coal miner, whom he had known and worked with for about two years,

and saw him and his wife at that time, but they could not be present to testify at the trial because they were subpoenaed to attend a murder trial in Murphysboro. After staying at Leckner's house fifteen or twenty minutes he went to the Iron Mountain depot at Bush,—about three-quarters of a mile from Leckner's. His wife was with him and he talked to McGrill until the train came, and from there went to Herrin on the Missouri Pacific passenger train, arriving at Herrin about ten o'clock. He was afterward married to his wife on December 17. He had been married to her before. He said that the closest point he was to Zeigler that night was ten miles by rail and twelve miles by road and that he was not in the drug store. He denied all connection with or knowledge about the robbery. He testified that Mrs. Patterson came to the jail while he was lying on a cot reading a book, and she passed by him and went around the jail. Mr. Martin said, "Is that him?" and she said, "I do not know." Martin said, "Stand up, so you can look good," and asked, "Have you ever seen him before?" She said, "I think I saw him in Zeigler," and the plaintiff in error said, "No, you're mistaken," and that is all that was said.

Neither the plaintiff in error nor the People introduced any evidence fixing the exact date of the crime, but the co-defendant, Charlie Boucher, testified that he went into the drug store where Betts was working about 6:30 in the evening of December 7, 1920, and bought a bottle of perfume, and that later the same evening he heard the drug store had been robbed.

George Manis testified that Charlie Boucher was in the candy kitchen, where Manis was employed, on the evening of December 7, about seven o'clock; that he heard the drug store had been robbed that evening about seven o'clock. Charlie was in the candy kitchen at that time. Doc King testified to substantially the same thing.

The sheriff testified that Mrs. Patterson was in the jail at the time testified to by her and that he did not give her any assistance.

The evidence of the prosecution is sufficient to sustain the conviction. If Mrs. Patterson is not mistaken the defendant is guilty. The testimony introduced in behalf of Charlie Boucher seems to fix the date of the crime on December 7, and if the testimony of the defendant and of the witnesses in his behalf is true, then Mrs. Patterson is mistaken. No reason appears for the plaintiff in error's taking this ride from Herrin to Hurst to have supper at his brother's on this particular evening and immediately afterward going back by train to Herrin. Only one witness for the prosecution has identified the plaintiff in error, while four witnesses besides himself have testified to his alibi. In such a condition of the evidence it is the special function of the jury, where the facts testified to cannot be reconciled, to determine what is the real truth of the matter. The determination of this question involves a consideration, among other things, not only of the actual words used by the witnesses but of their appearance and conduct on the witness stand, their interest in the case, the candor with which they testify, the accuracy of their observation, their opportunities of knowledge, and the circumstances surrounding the occurrence to which they testify. The court will not reverse a judgment in a criminal case upon the ground that it is contrary to the evidence unless it clearly appears that there is a reasonable doubt of the defendant's guilt, and it cannot be said that there is a reasonable doubt of the defendant's guilt merely because the evidence is contradictory or because more witnesses testify in favor of the defendant than in favor of the prosecution. In such situations it is the most important function of the jury and their peculiar province to determine the truth of the case, and the opportunity which they have of seeing and hearing the witnesses during their examination and cross-examina-

tion is clearly superior to that of a court of review, which has before it only a record of the words used by the witnesses. We cannot say that the jury were not justified in being convinced, beyond a reasonable doubt, of the defendant's guilt, and the judgment will therefore be affirmed.

Judgment affirmed.

(No. 14312.—Decree affirmed.)

MARY HOLLAND *et al.* Appellees, *vs.* THE PEOPLE'S BANK
AND TRUST COMPANY, Exr. Appellant.

Opinion filed June 21, 1922.

1. **WILLS**—*when verdict in will contest case will not be disturbed.* Where the testimony on either side in a will contest case is such as, uncontroverted, will justify a finding either for or against the complainants, the Supreme Court will not disturb the verdict and decree setting aside the will.

2. **SAME**—*when failure to withdraw issue of undue influence is not prejudicial.* Where a will is contested on grounds of mental incapacity and undue influence, the denial of a motion to withdraw the issue of undue influence is not prejudicial error even if there is no evidence to sustain that charge, where the finding that the will was not the last will and testament of the testator is supported by testimony that he was not of sound mind.

3. **SAME**—*when person named as executor in former will is a competent witness in contest case.* In a will contest case a witness is not rendered incompetent because he was named as executor in a prior will which he had written for the testator, where he testifies that he waives any right to qualify as executor should the prior will ever be presented for probate.

4. **SAME**—*effect where a will is in testator's handwriting—instruction.* The fact that a will is in the testator's own handwriting does not justify an instruction stating that if the will is rational on its face and disposes of the testator's property in a rational way "such fact may of itself establish testamentary capacity," as the fact that the will is in the testator's handwriting is only a circumstance tending to show mental capacity and does not of itself establish such capacity if other evidence shows he was insane.

5. **EVIDENCE**—*what interest is necessary to disqualify a witness.* The interest which, under the Evidence act, will disqualify a witness in a proceeding to contest a will must be a legal interest in the result of the suit and must be certain, direct and immediate.

6. APPEALS AND ERRORS—*objection to competency of witness can not be made for first time in Supreme Court—minors.* A particular objection to the competency of a witness cannot be made in the Supreme Court if the objection was not made at the trial even though the competency of the same witness was objected to on other grounds, and the fact that a guardian *ad litem* made no objection in behalf of infant defendants does not authorize another party to complain of the alleged error, especially where the prayer of the guardian for an appeal was denied, presumably upon the ground that an appeal would not be in the interest of the infants.

APPEAL from the Circuit Court of Winnebago county;
the Hon. EDWARD D. SHURTLEFF, Judge, presiding.

FRANK M. RYAN, (ROY F. HALL, and CHARLES W.
FERGUSON, of counsel,) for appellant.

FISHER, NORTH, WELSH & LINSKOTT, for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court :

The bill in this case was filed to contest the will of Anthony Torbert, deceased. The bill alleged Torbert was of unsound mind and memory, that he was in his dotage, and his mind was so impaired as to render him incompetent to make a valid will; that he had previous to making the will been adjudged a feeble-minded person and a conservator had been appointed for him. The bill also alleged that certain persons interested in certain alleged claims against Torbert, based on sales of worthless stocks and bonds to him, exercised undue influence and practiced fraud on him, and resorted to falsehood and misrepresentations to induce him to execute the alleged will. Testator was about eighty-four years old at the time of his death, which occurred September 7, 1918. His wife had died about four years previously. His will was executed December 15, 1916. His only heirs were four married daughters, each of whom had one or more children. The will was written with a pen by testator and is as follows:

"This is the last Will and Testament made by me on this 15th day of December, 1916.

first I want the Peoples bank and Trust Company to act as executor & trustee.

second I want all of my deabths and funrcal expenses to be paid

Third I give and devise all my property to the peoples bank and Trust Company in Trust to pay out of the income to each of my four daughters, Etta, Mary, Ada Bell, and Edith, a fourth of such income on or about the first day of each month as long as they live, & to pay such income to them personally & not to any agent or attorney for them, I do not want them at any time to go in debt anticipating these payments

Fourth, at the death of any one of my daughters, I give to the children of such daughters, who may survive their mother a one fourth share of my whole property to be the absolute property of such children. It is my intention that only those of my grandchildren who survive their mothers shall participate. And I direct that at the death of any one of my daughters that my Trustee and executor shall with the aid & advice of the County Judge of Winnebago County distribute and divide among the surviving children of that deceased daughter the one fourth of my entire property as above provided. No grandchild shall dispose of any of his or hers contingent interest before the death of such grandchilds mother—

Fifth, In my lifetime I have advanced some money to my daughters, and it is my wish that my Trustee collect it as follows, to Mary Holland I loaned \$125 dollars for an operation, and also loaned Mary Holland \$500 dollars for legal matters in her divorce case in Kansas. there is a claim I have against Walter Holland for \$30 dollars for rent advanced about the year 1894 for the comings farm just west of the Cutler estate just down the river road. as to the money which Ada Bell Delbridge owes me amounting \$374 dollars and also the \$600 dollars paid to Dr. Carter by me I do not wish my Trustee to collect this amount, but I give this to Ada Bell.

Sixth; I consented last April 1916 to let my old friend Harry Andrews act as my conservator at the urgent request of my daughters and therefore I do not wish that any of my daughters, or any one for them shall attempt to break or set aside this my last Will, and if any of my daughters do attempt to set aside or break this will that daughter or daughters trying to do so shall be cut off with one half of her share as above provided, and the extra amount given daughters who do not attempt to break this my last request of them

7th, I request that my Trustee do not sell for a period of at least 5 years either my old farm in Ogle County or my share of of the

Dakota land now owned by H. B. Andrews and myself, or Sell my Speculative Stocks for a period of 3 years

I, Anthony T. Torbert, on this 15th day of December, at the age of 83 years have written with my own pen these foregoing lines 55 in number as my last will & testament, and have seald and declared this my will in the presence of the undersigned, who at my request and in my presence, and in the presence of each other have signed their names hereto as attesting witnesses. These witnesses have been informed by me that I have Harry Andrews, as conservator attending my business, but I believe that I am able able to make the above will, disposing of all of my property, both real & personal to those who are the natural objects of my bounty.

ANTHONY T. TORBERT.

We the undersigned attesting witnesses in the presence of Anthony T. Torbert and in the presence of each other do hereby subscribe our names as witnesses to Mr. Torbert's last will and testament. And we certify that we have heard the foregoing will read in person by Mr. Torbert, have each of us seen him sign his name and have signed our own names in the presence of each other.

DAVID TURKENKOPF,
ARTHUR W. ROBERTSON,
FRANK J. O'BRIEN,
IRA C. JOHNSON."

The will was admitted to probate and the four daughters filed the bill to contest and set aside the will and its probate. The People's Bank and Trust Company, named as executor and trustee, and all the testator's grandchildren, were made defendants. A guardian *ad litem* was appointed for the grandchildren who were minors. The executor and trustee answered the bill denying its allegations, and the guardian *ad litem* answered for the minors. An issue was made up and submitted to the jury whether the paper purporting to be the last will and testament of Anthony Torbert was his last will and testament. A trial was had, and the jury returned a verdict that the writing offered in evidence was not the will of Anthony Torbert. The court overruled a motion for a new trial and entered a decree setting the alleged will and its probate aside and declaring them null and void. The executor prosecutes this appeal from that decree. The court denied the prayer of the guardian *ad litem* for an appeal.

Twenty-four witnesses for each side testified on the trial of the case, and, as usually occurs in such cases, the testimony was conflicting. The testator had until the last few years of his life been a man of strong mentality, read a great deal and had good health. He had accumulated his property, which at the time of his death was of the value of \$106,000. It consisted of a farm of 200 acres in Ogle county, unimproved land in North Dakota, some land in Texas, and properties in and near Rockford. His residence was in Rockford, and was occupied at and before his death by his daughter Mrs. Lumley and her son by a former marriage, Ronald Smith, with whom he lived the greater part of the time. His personal property of any value consisted of stock in the Andrews Wire Works, at Rockford, notes and mortgages and Liberty bonds. He also owned some speculative stocks, which appear to be of no value. Before a conservator was appointed for him he signed a note for \$5000 or \$6000 in connection with the Dominion Gravel and Dredging Company, which company appears to be worthless. He also bought some bonds of the Sycamore and Woodstock Traction Company which were of no value, and gave his note for a large amount to a man named Elmore, because Elmore told him his bank account was limited and he had to have more money to make business go. These notes turned out to be judgment notes and became the property of the DeKalb Trust and Savings Bank, and the bank later took judgment by confession on the notes.

In March, 1916, testator called on Harry B. Andrews, a lawyer in Rockford who was his personal friend and adviser, and asked Andrews if he would act as conservator for him. He said they (evidently meaning his daughters) were insisting that a conservator be appointed for him, and he was willing provided Andrews would act. Andrews consented to act as conservator if he and his four daughters were willing that he should. Shortly thereafter the daughters filed a petition in the county court for the appointment

of a conservator. Torbert resisted the appointment, and after a trial had progressed two or three days, he, his four daughters and their attorney went to Andrews' office. An agreement was there reached that Andrews should be appointed conservator, and Torbert signed the following paper, dated April 15, 1916, addressed to the county judge:

"To Honorable Judge Louis M. Reckhow:

"I hereby request that a conservator be appointed for me, and that my attorney, Harry B. Andrews, be appointed as such conservator and that he give bonds for same according to law. I agree that the jury may make a finding that a conservator may be appointed, as I feel that on account of my advancing years I am unable to properly care for my estate.

A. T. TORBERT."

Dated April 15, 1916.

Thereupon the trial ended and Andrews was appointed and qualified as conservator and so continued until Torbert's death.

The will was executed December 15, 1916, in the directors' room of the Winnebago National Bank, at Rockford. The testator, accompanied by one of the appellant's solicitors, went to the bank on that occasion, the testator having in his possession the will written by himself. Two of the witnesses to the will, O'Brien and Robertson, were assistant cashiers of the bank. Turkenkoph was a clothing merchant and Johnson proprietor of a laundry. Johnson was requested to come to the bank by the attorney, and Turkenkoph did not remember who requested him to come. All four of the witnesses went into the directors' room with Torbert and the attorney and they were asked to sign the will as witnesses. It had not been then signed by the testator and the attestation clause had not been written. That was written in the bank by Robertson and was dictated by the attorney. The testator read the will aloud, then signed it, after which it was signed by the four witnesses. At the request of the testator Robertson took the will and put it in testator's box in the bank. Testator also left his key to the box with Robertson.

The four witnesses to the will testified on the trial that they believed the testator possessed mental capacity to intelligently and understandingly do what he did there. The other witnesses on behalf of proponents, some of whom had had business transactions of a not very important nature with the testator about or after the time the will was executed, testified they believed the testator was of sound mental capacity and capable of knowingly and understandingly transacting business at the time he made his will. After Andrews had been appointed conservator the DeKalb bank filed a bill in the circuit court of Ogle county to set aside a deed made by Torbert to his daughters of the farm in that county, as a fraud on his creditors. Andrews, as conservator, filed a cross-bill to set aside the same deed, and it was set aside. Torbert testified as a witness on the trial of the case and a transcript of his testimony was introduced in evidence by proponents on the trial of this case.

Dr. Day was the only medical witness who testified on the trial. He was a witness for contestants, and testified the first time he was called to treat the testator was February or March, 1917. Testator was then at the house of his brother-in-law, St. John. The doctor treated the testator from then on until his death, the testator many times visiting the doctor at his office. The testator was then eighty-three years old, and the doctor testified he had senility of both body and mind, which is called senile dementia. Testator lived with his daughter Mrs. Lumley, and in January, before the doctor first saw him, he had gone from her house to St. John's, where he stayed until April of the same year. The doctor said when he called to see testator at St. John's testator said he had been sleeping in some awful place,—a nest of some sort,—and having a bad time. Mrs. St. John testified he told the doctor he had taken cold by sleeping in the cat's nest; that he had slept in the cat's nest from ten o'clock one day until three o'clock the next day. She said he had been staying at their house and had

not been in any cat's nest. Dr. Day described the symptoms, characteristics and effects of senile dementia, and said it was a progressive lessening of the mental functions; that its most common characteristic is inability to retain recent knowledge that comes to the individual. They practically all have a very good memory of things which occurred earlier in life but cannot remember recent occurrences very well. The doctor testified Torbert had some heart trouble, which caused him discomfort and for which the doctor treated him, but he had lost a greater per cent of mental than physical vigor. Some days a person so afflicted would have a clearer mind and better grasp on what he was doing than on other days, and what might be desirable to such person on one day or time would be undesirable on another day or at another time. One of the characteristics of persons so afflicted is that they become antagonistic to old friends and persons they formerly liked and trusted and become attached to and repose confidence in strangers. The doctor said he was not prepared to say that if Torbert wrote the will himself December 15, 1916, while free from outside influence, he did not then know what was in it, but he said it was a fact that some days his mental condition was better than on other days; that at times he might know what property he had and at others would not, but basing his opinion on what he knew and observed of Torbert from the time he first saw him until his death, the doctor stated he was not in a mental condition on December 15, 1916, to prepare such an instrument as his will and know and understand its effect and consequences. A person afflicted with senile dementia becomes more and more subject to temporary whims and vagaries and is very changeable.

Andrews, the conservator, on behalf of contestants, testified at great length, but we shall not attempt to even summarize his testimony. He testified that shortly after the death of Torbert's wife his failing mentality became notice-

able, and witness related many incidents and circumstances he observed from time to time in the conduct and conversations of Torbert which indicated a failure of mental power and seemed incompatible with sound mind. Witness testified that in his opinion testator was insane from January 1, 1916, until his death, and the incidents he related upon which he based that opinion were of a character to give it some support. Andrews' partner, Essington, who knew and saw much of the testator, corroborated the testimony of Andrews and related many incidents and occurrences and conduct and conversations of the testator upon which he based his belief and opinion that he was insane.

Many of the witnesses for contestants who testified Torbert was insane related the reasons for their opinion. Some of them were, that he would get lost in the city where he resided, and sometimes in the neighborhood where he lived, and would have to be conducted to his home. On one occasion when he was staying at St. John's he went to the house of someone else near the St. John house and tried to get in. He thought a residence back of the St. John home, where there were some milk bottles on the porch, was a milk depot. He planted peach trees three feet apart because he said the more trees there were the more fruit there would be, and he watered the trees when there was snow on the ground and when the ground was frozen. While at St. John's he would go to bed in the rooms of other members of the family instead of his own room. Mrs. St. John testified he went to bed in every room up-stairs. At one time she found him on a bed which had nothing on the bedstead. He would take a nap in the afternoon, and when he awoke he would think it was morning, would wash and prepare for breakfast. He released a real estate mortgage on real estate to secure a note for \$1000 without payment of the note. He could not give any coherent reason for his action when asked about it, but finally said he might have released it because the mortgagor told him that would

enable him to avoid paying taxes on it. Many other circumstances were related by the witnesses of acts and conversations of Torbert which would seem to indicate his mental faculties were impaired. It would unduly lengthen this opinion to further attempt anything like a recital of the testimony and we believe would serve no useful purpose.

The principal part of appellant's argument is devoted to the proposition that the verdict of the jury and the decree of the court are contrary to and not warranted by the evidence. Proponent's evidence tended to show Torbert possessed sufficient mental capacity to make a will, and contestants' evidence tended to show his mind and memory were so impaired that he could not understandingly execute a will. Contestants' evidence did not, as contended, tend to show merely that Torbert, due to old age, was feeble in mind and body, but tended to show he was so mentally unsound as to be incapable of understanding the business of making his will. In such a situation the question is properly submitted to the jury for determination. This court has held that where the testimony on either side is such as, uncontroverted, would justify a finding either for or against the complainants, a reviewing court will not disturb the verdict and decree, even though it might entertain a different view from the court below if the evidence were submitted to it as an original proposition. (*Wilcoxon v. Wilcoxon*, 165 Ill. 454; *Bundy v. West*, 297 id. 238.) Any attempt to set out the evidence in detail could only serve the purpose of showing it was conflicting. There is nothing in the record to indicate the witnesses on one side were more intelligent or credible than those on the other side. Considering the entire evidence on both sides, without expressly referring to it in detail, it cannot be said the decree of the circuit court is manifestly contrary to the evidence and should be reversed on that ground. *Judy v. Judy*, 261 Ill. 470; *Kellan v. Kellan*, 258 id. 256; *Aftalion v. Stauffer*, 284 id. 54.

At the conclusion of the evidence appellant moved the court to withdraw from the consideration of the jury the question of undue influence, whereupon appellees asked and obtained leave, over appellant's objection, to amend the bill so as to charge that the testator was unduly influenced by certain persons or person unknown to complainants, and the court denied appellant's motion to withdraw the question of undue influence from the jury. This action of the court, it is claimed, was reversible error. The nature of the amendment was such that appellant was not prejudiced by it. No specific finding was made by the jury on the question of undue influence, but the finding was that the instrument was not the last will and testament of Torbert. We have held that if the finding was supported by the testimony that the testator was not of sound mind, the decree should not be reversed even if there was no such evidence to sustain the charge of undue influence. *Aftalion v. Stauffer, supra*; *Bundy v. West, supra*.

When Andrews was offered as a witness by appellees his competency was objected to by appellant. He testified, out of the presence of the jury, that some time in 1915 he had written a will for Torbert in which the witness was named as executor. That will appears to have been lost or destroyed,—at least it has not been found. On the ground that the witness was an interested party under the provisions of that will his competency to testify was objected to. He testified he waived any right to qualify as executor should the will in which he was named executor ever be presented for probate. The interest which will disqualify a witness under the Evidence act must be a legal interest in the result of the suit and must be certain, direct and immediate. (*Ackman v. Potter*, 239 Ill. 578; *Bellman v. Epstein*, 279 id. 34.) The possible interest of the witness was very uncertain and remote. He was a competent witness.

We think it very probable, as contended by appellant, that some incompetent questions were asked and permitted

to be answered. There is scarcely a case tried where the testimony is so voluminous as in this case where that does not occur, but unless it is of a more prejudicial character than that which occurred on the trial of this case it affords no reason for a reversal of the decree. The record is as free, we believe, from prejudicial error in that respect as will usually be found where there is such a large mass of testimony.

The court gave for appellant an instruction that if the will was in the handwriting of the testator there is a presumption that he executed it voluntarily and unaided, and that presumption must obtain until the contrary is shown by the evidence. The court refused an instruction asked by appellant which stated the same proposition and continued that if the will appeared rational on its face and disposed of testator's property in a rational way, "such fact may of itself establish testamentary capacity." We think there was no error in refusing that instruction. The will was in the handwriting of the testator, but when or where or under what circumstances it was written is not disclosed by the evidence. There was much testimony that he was not of sound mind when it was executed, but the jury would be likely to understand from the instruction that the fact that the will was in testator's handwriting of itself established testamentary capacity. If he was, in fact, insane when he executed the will, the fact that it was in his handwriting would not render it valid. That it was in his handwriting was a circumstance tending to show mental capacity, but would not of itself establish such capacity if other evidence showed he was insane.

Some other complaints are made of a few instructions, but they are not important in character. The jury were fully and fairly instructed as to the law governing the case.

We find no error in the record which would warrant a reversal of the decree, and it is affirmed.

Decree affirmed.

Subsequently, on petition for rehearing, the following additional opinion was filed:

Per CURIAM: The foregoing opinion was adopted at the February term and a judgment was entered affirming the decree of the circuit court. At the April term a petition of the appellant for a rehearing was allowed because of the question of the competency of Harry B. Andrews as a witness. The petition contained other points, also, which it was suggested had been overlooked or misapprehended. They were not overlooked, for the opinion discusses the merits of all those points, though it does not always agree with the conclusions of the appellant's counsel in regard to them or in regard to their weight and importance. We have again considered the record with reference to these points and the arguments of counsel and have reached the same conclusion as on the former hearing.

In regard to the witness Andrews, the appellant contended in its original brief that his whole testimony was incompetent on account of his interest, because he was the conservator of the testator and as such conservator had the right to administer the estate of the testator in case the will were set aside, and also because there was a prior will of the testator, which had been duly executed, in which Andrews was named as executor. In the opinion filed at the February term this objection, so far as it related to the prior will, was discussed and held insufficient because the interest of the witness was not a direct interest in the result of the suit but was a possible contingent and indirect interest, too uncertain and remote to constitute a disqualification. The objection because of the witness having the right, as conservator, to administer the estate of the decedent if the will were set aside was mentioned in the brief but was not considered, because the argument as to the question was devoted entirely to the other objection. We are satisfied with what is said in the opinion as to that objection.

The answer of the appellees to the petition as to the objection because of interest of the witness Andrews as conservator is that that objection was not made in the circuit court, and an examination of the record shows that this is true. The objection because of interest was based entirely on the prior will, and the question of the conservatorship was not mentioned in that connection. The objection appears in the appellant's brief but not in the record. Since it was not made on the trial it cannot be made for the first time in this court.

It is suggested by the appellant that some of the defendants were minors, and that the duty of the court to minors did not end with the appointment of a guardian *ad litem* but it was the duty of the trial court not to permit the testimony of an incompetent witness to be used to deprive the minors of the estate devised to them by the will even though the guardian *ad litem* did not object. The only appellant in this court is the People's Bank and Trust Company,—the executor named in the will. It is true that the court will protect the interest of minors and will not permit their rights to be lost through the neglect of a guardian *ad litem*, but this rule does not authorize another party to complain of errors of which an infant may complain but does not. The infants do not join in this appeal. They prayed an appeal through their guardian *ad litem*, which the court denied. It is to be presumed that the reason was that in the judgment of the court such an appeal would not be in the interest of the infants. Whatever the reason, the infants are not here complaining of the action of the court and no other party can complain in their behalf.

The former opinion is again adopted as the opinion of the court, and the decree is affirmed. *Decree affirmed.*

(No. 14168.—Judgment affirmed.)

THE CARTERVILLE AND BIG MUDDY COAL COMPANY, Plaintiff in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.*—
(A. J. BROOKHOUSE, Defendant in Error.)

Opinion filed June 21, 1922.

1. WORKMEN'S COMPENSATION—*when question of constitutionality of Compensation act is waived.* Any question as to the constitutionality of the Compensation act is waived by participating in the hearings before the arbitrator and the commission without objection and by entering into a stipulation that the party is operating under the act, and such party cannot afterward raise the question in the circuit court.

2. SAME—*when evidence is sufficient to sustain award for injury to a miner from bad air.* An award for an injury to a coal miner because of bad air in the mine is sustained by evidence that he became afflicted with the condition complained of while he was working in the mine and that the doctor who examined him found he was suffering with the symptoms which attend the condition resulting from bad air in a mine, notwithstanding there is also testimony that he had been treated by the doctor for intestinal trouble during the year prior to the alleged injury.

WRIT OF ERROR to the Circuit Court of Williamson county; the Hon. D. T. HARTWELL, Judge, presiding.

CHARLES C. MURRAH, for plaintiff in error.

Mr. JUSTICE DUNN delivered the opinion of the court:

The circuit court of Williamson county quashed a writ of *certiorari* issued on the application of the Carterville and Big Muddy Coal Company to review a decision of the Industrial Commission which sustained an award by an arbitrator of compensation to A. J. Brookhouse under the Workmen's Compensation act, and the record of the circuit court has been filed as a return to a writ of error allowed on the petition of the Carterville and Big Muddy Coal Company.

One of the errors assigned is based on the unconstitutionality of the Workmen's Compensation act. That ques-

tion was waived by the plaintiff in error by participating in the hearings before the arbitrator and the commission without objection and by entering into a stipulation that it was operating under the act, and it could not afterward raise the question for the first time in the circuit court. *Taylor Coal Co. v. Industrial Com.* 301 Ill. 381.

The only other question urged is the absence of any competent evidence to justify the award. The claimant is a coal miner, and testified that he went down into the mine on the morning of July 5, 1919, about 6:30 and went direct to his room. He came out about noon because he seemed to be "through." He could hardly get his breath and could not work any more because of the air. He had had considerable experience in coal mines, having worked fifteen years as a coal miner, and he understood a good deal about the air in mines. He got short of breath and weak and jerked all over before he came out of the mine. He did not go to a doctor immediately after going home but was unconscious for two days and two nights and had a headache. His son took him in a car to Dr. Miles Baker, who told him what he was suffering with, and he has not worked since. His head pains him from the effects of the bad air in the mine. About two weeks after the event he went to the superintendent and asked him for compensation, saying that he was down and not able to work on account of the air. When he first went to his room on the day he was overcome he found there was not much air, and the condition got worse, coming on slowly during the four hours he was at work. On cross-examination he testified that he was not exactly unconscious when he came out of the mine but knew enough to stagger out, and came out with the help of a stick and sat down in the shade. He went home and stayed there two weeks. He was conscious on the 5th and until the middle of the evening on the 6th, and then he didn't know anything on the 7th. He said he could not tell just what the air had in it that made it bad. It was

some kind of gas. It was poisoned air that gathered over the water, and the reason he knows it was bad was because it made him sick, short of breath and weak, and caused him to tremble all over so he could not work; that the trouble was not the same he had had for several years.

Dr. Baker testified that the claimant came to him for treatment in July, 1919. He sent him some medicine, and a day or two later the claimant's son brought him in an automobile to the doctor's office and an examination was made. The claimant had a slight fever and difficulty of breathing, shortness of breath, and said he had had a high fever and was out of his head. The doctor attributed the difficult breathing, which he said was something like an asthmatic condition, to the bad air. He had treated a number of bad-air results,—poisonous conditions,—and Brookhouse had the symptoms of such condition and that was what the doctor treated him for. The doctor testified that at the time of the hearing, in October, 1921, Brookhouse was much better, his difficult breathing was gradually leaving him, he could do some work without injury and he would gradually recover. On cross-examination he testified that he had treated Brookhouse for about a year for intestinal indigestion. He would have diarrhoea at times, attacks of which would give him some trouble. The doctor treated him for this disease at times, only, and did not treat him in July for the same thing he had been treating him for prior to that time, though sometimes during this treatment Brookhouse had a recurrence of his diarrhoea. The doctor based the conclusion that his trouble was due to bad air on his difficult breathing when he first came to visit the doctor, and advised him to go to Creal Springs on account of his difficult breathing. The doctor testified that he did not think it would be possible for a man to have a case of chronic stomach trouble caused from carbon dioxide poisoning; that he had never had any experience with it; that the poison usually affects the lungs and nerve centers.

He testified that Brookhouse came to his office and got medicine for the past year or so; that there was a difference in his trouble in July; that his trouble then was difficult breathing,—rather an asthmatic condition; that the man was air hungry,—couldn't get enough air down in his lungs; that mine gas poisoning sometimes lasts for two or three months; that a man cannot make any exertion without bringing on the difficult breathing. The doctor had seen it remain four months after the patient was removed from the carbon dioxide air.

From this statement it is manifest that the contention of the plaintiff in error that there is no competent evidence in the record upon which to base the award cannot be sustained. According to this testimony the claimant went into the mine and worked four hours. The air was bad when he went in and became gradually worse the longer he remained. He got short of breath and weak and could not work any more. He came out of the mine, and when he visited the doctor was found to be suffering with the symptoms which attend the condition resulting from bad air in a mine. In the three months prior to the hearing before the arbitrator his condition gradually improved, and the doctor stated that at that time he could do some work without injury and would gradually recover. Uncontradicted this evidence was sufficient to sustain the award, and it is not substantially contradicted.

The claim is made that Brookhouse's disability arises from the physical condition for which he had been treated during the year before July, 1919, but the evidence does not warrant such conclusion. This occurrence arose and the hearings were had before the amendment of the law in 1921 which authorizes the court to review the questions of fact, and we are therefore precluded from weighing the evidence and determining the preponderance.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

(No. 14437.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. PARIS MATLOCK, Plaintiff in Error.

Opinion filed June 21, 1922.

1. CRIMINAL LAW—*when misconduct of juror is not ground for new trial.* Although the court at the beginning of the trial has ordered that the jury remain together, the separation of one juror from the others during the noon hour because of his misapprehension as to what the court's order was in that regard is not sufficient ground for granting a new trial, where there is no showing that the defendant was prejudiced thereby.

2. SAME—*when error in instruction will not work a reversal.* If it can be said from the record that an error complained of in an instruction could not reasonably have affected the result of the trial the judgment will not be reversed for such error.

3. SAME—*new trial will not be granted to secure cumulative evidence.* A new trial will not be granted upon the ground of newly discovered evidence where the affidavits of the new witnesses show that their testimony will be merely cumulative and not decisive of the issues.

4. SAME—*defendant must use diligence to secure a desired witness at the trial.* A defendant who fails to use diligence to secure the attendance and testimony of a certain witness at the trial and makes no motion for a continuance because of his absence is not entitled to a new trial to produce such witness, particularly where the proposed testimony, as shown by his affidavit, is in the nature of impeaching testimony, only, and is denied by counter-affidavit.

WRIT OF ERROR to the Circuit Court of Jasper county;
the Hon. FRANKLIN R. DOVE, Judge, presiding.

DAVIDSON & FITHIAN, for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, WILLIAM E. ISLEY, State's Attorney, and FLOYD E. BRITTON, for the People.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

At the October term, 1919, of the Jasper county circuit court Paris Matlock was indicted by the grand jury for unlawfully obstructing a certain public highway in said county

and also for disorderly and boisterous conduct. He was convicted upon both charges and fined by the county court, the indictment having been certified to the county court for trial. The indictment charged that he unlawfully and willfully obstructed and unnecessarily hindered Josiah Matlock and Prosper Matlock, while lawfully driving and traveling upon said highway, "by then and there in the night time of said day unlawfully and willfully and unnecessarily driving and stopping his automobile upon the left-hand side of said highway in front of the team and vehicle of the said Josiah Matlock, and by then and there unlawfully and maliciously standing in said highway and threatening the said Josiah Matlock with bodily injury unless he then and there turned to the left," etc.

The testimony disclosed that the public highway in question runs north and south. Near the point where the parties met the road formerly for a quarter of a mile curved to the east of the north and south section line, and in about 1916 the road authorities straightened the road at this point and put it on the north and south line and prepared the new or changed part of the road for travel. In October, 1919, at the time Paris and Josiah Matlock met on the road, both the old and the new parts of this road were traveled. The two parties met near the half-way distance between the points where the old road leaves or varies from the new road and returns to it, and the two roads at this half-way point are not very many feet apart. Paris at the time in question was traveling south on the old road, and gave as his reason that the new road had some stumps in it that made it bad traveling for his automobile. He had with him in his automobile a lady by the name of Frances Rife, who never appeared as a witness in either of the trials herein referred to. Josiah and his son, Prosper, were traveling north on the old road-bed at the time in question. Prosper was about one hundred yards in advance of his father and was walking, leading a cow, and his father was following

in a wagon loaded with wood and drawn by two horses, and he had a third horse abreast of the other two horses. Paris had passed Prosper, according to the claim of the People, while driving his automobile on the east side of the highway and continued south on the east side of the highway until about sixty feet north of Josiah, when he stopped his automobile on the east side of the highway, thereby leaving no sufficient room for Josiah to pass the automobile on the right-hand side (or east side) of the road as he traveled north. Josiah had also stopped his wagon and horses, and while Paris and he were thus standing in the road, about sixty feet apart, Prosper shouted to his father not to give the highway or all of the highway, and promptly after this shouting Paris began cursing Prosper and using vile language, and according to the claim of Prosper and his father, Paris also compelled Josiah to pull his team to the left and cross a ditch about sixteen inches deep or more, on the west side of the road-bed, into the new highway already described, for want of sufficient room to pass the automobile on either side of the old road. On the trial of the cause in the county court Prosper and his father testified that Paris obstructed the passage of Josiah willfully by simply stopping slightly on the east side of the old road so as to prevent him from passing otherwise than by crossing the ditch as aforesaid, and there were other witnesses who corroborated them in this evidence. Paris, on the other hand, testified positively in the county court that he stopped his automobile sixty feet north of Josiah and his team and on the west side of the road and as far west as he could get his machine, leaving plenty of room for Josiah to pass him on the east, and that Josiah did pass him on the east and continued north on the old road. He admitted cursing and abusing Prosper after Prosper had shouted to his father not to give any of the road, but also testified that he told Josiah to come on,—that there was plenty of room for him to pass on the east,—and that Josiah did pass him on the

east side. The sole issue or question in that case on the facts was as to whether or not Paris stopped his machine on the west side of the road and allowed Josiah to pass him on the east, as he testified, or whether or not he stopped it just to the east edge of it, so as to block the passage of the wagon and force Josiah to cross the ditch into the new road.

After the trial in the county court was over, and at the April term, 1920, of the circuit court of said county, the grand jury returned an indictment for perjury against Paris Matlock, consisting of two counts. This indictment was based on the alleged false testimony of Paris in the trial of the case in the county court. The charge in both counts of the indictment is substantially the same, and after the usual averments in such indictments both counts make the direct charge, in substance, that Paris Matlock in the cause in the county court "did depose and swear * * * that he, the said Paris Matlock, did not obstruct the said Josiah Matlock upon said public highway, but did seasonably and properly turn to the right far enough to permit the said Josiah to pass his, the said Paris Matlock's, automobile on his, the said Paris Matlock's, left, unobstructed, and that he, the said Josiah Matlock, did then and there so pass with his team and wagon at the time and place alleged in the indictment." On the trial before a jury the plaintiff in error (hereinafter referred to as the defendant) was found guilty and judgment and sentence were entered against him by the circuit court that he serve an indeterminate term in the penitentiary, and he has sued out this writ of error to review the judgment of the circuit court.

The issues of fact in the circuit court were plain and simple and were the following: (1) Did the defendant swear on the trial in the county court that he did seasonably and properly turn to the right far enough to permit Josiah Matlock to pass his automobile at the time in question unobstructed, and that Josiah did then and there so pass

with his team and wagon on the defendant's left, or did he swear to those facts in substance? (2) Did he swear to those facts willfully and corruptly, knowing at the same time that he was testifying falsely and corruptly and with intent to secure a verdict of not guilty that he was not justly and legally entitled to have?

There is no question made by the defendant that he did not testify to the foregoing state of facts in the county court. His only claim is that the facts to which he testified are true, and that for that reason he is not guilty of the charge of perjury. He testified to the same state of facts in the circuit court and which are above set forth, and in substantially the same manner as he did in the county court, as we have already set forth. The only real issue, therefore, in this case is whether or not his testimony aforesaid was true or false, for if his testimony was untrue it is morally certain that he positively knew that he was testifying falsely and corruptly when he gave such testimony. Prosper and Josiah Matlock testified in the circuit court as to what occurred at the time they met the defendant on the road, to the same effect as we have already indicated that they testified to in the county court, and their testimony as to the foregoing issues is diametrically contrary to the testimony of the defendant. It will serve no useful purpose to detail the evidence of these three witnesses any further than we have. It is proper to state that the defendant is a cousin of Prosper and a nephew of Josiah, and all three and their families are not on very friendly terms and do not associate or visit with each other.

The questions of fact in this case having been settled by the lower court and the jury, there is absolutely no reason for this court, so far as the record shows, to set aside the verdict and judgment in this case on the evidence after a careful and critical consideration of the testimony of the three Matlocks,

There is a further reason why this court should not interfere with the verdict and judgment in the case upon the consideration of the evidence alone. Prosper and Josiah Matlock were corroborated by the mother of Prosper and also by other witnesses. Mrs. Matlock testified, in substance, that she visited the place where the defendant stopped his machine when he met the two Matlocks and that she examined the roadway there and tracked the automobile of the defendant home. She also testified that she saw the tracks of the wagon at the place where it turned out to the west and across the ditch and that it was going north; that the automobile stopped on the east side of the road, with the wagon and horses directly in front of it, and there was just room for the horses to turn around and cross the ditch, and that there were obstructions on both sides of the automobile that would prevent the wagon and team from passing it on either side of the old road. Clarence Bryan, another witness for the People, testified that he examined the road the next morning at the point in question, and that the wagon tracks at that point "went on the west side,—it pulled out to the west." He did not know how long it had been after the tracks were made and did not notice what direction the wagon and horses were going, but it appears from the testimony of Mrs. Matlock that he went to the point in question with her the next morning after the event in question and that they got there about daylight. Another witness for the People, Levy Langley, testified that he went down to the place where Paris and Josiah passed each other, and that "the fellow on the wagon had passed out to the west on the west side of the road, across the ditch; he was going north;" and that he observed the tracks of the automobile and that it was traveling south. He did not observe whether there were any tracks passing on the east side of the automobile. There were four or five witnesses who testified in behalf of the defendant who were acquainted with the place on the road in question, some of

whom had visited the place at the instance of the defendant, who pointed out to them the place of meeting of himself and the two Matlocks. It does not definitely appear when these witnesses visited this place after the event in question. They described the road and the ditch that Josiah said he crossed in turning out west of the old road, and their description of the road and the ditch is in no way materially different from that of the witnesses for the People. They described the road as very narrow at that point, and some of the witnesses testified that there would have been plenty of room for the wagon to have passed on the east side of the defendant's machine through a field that was there and which was in cultivation. It does not definitely appear whether they are describing the exact place of the meeting of the Matlocks, and it does not definitely appear that they were there soon enough after the difficulty to see the wagon tracks, and they do not testify with reference to them.

Defendant makes the claim that the indictment is insufficient to sustain the conviction. The objections are directed mainly, if not solely, to the first count, which is faulty in several particulars, but if we concede that it is fatally defective on the motion in arrest of judgment, as argued by defendant's counsel, the objections do not apply to the second count. The second count of the indictment is sufficient to support the judgment of conviction, and therefore there is no sufficient reason given why the verdict and judgment should not be sustained.

It is also argued that the judgment ought to have been set aside by the court because one of the jurors separated from the panel at one of the noon hours, just after the jury was selected, after the court had made the order that the jury should be kept together and not allowed to separate. The record clearly reveals the fact that the juror was only absent from the panel about fifteen minutes and was found by the sheriff in a restaurant eating his lunch. This

occurred just after the jury had been impaneled, and it was clearly shown by affidavits that the juror separated from the jury under a misapprehension as to what the court's order was in that regard, and that he had talked to no one about the case and that no one talked to him about it. The defendant was not prejudiced thereby, and this is not sufficient ground for granting a new trial. *People v. Strause*, 290 Ill. 259; *Reins v. People*, 30 id. 256.

The fifth instruction given on behalf of the People closed with this direction: "It is sufficient to convict the defendant if it appears from the evidence beyond a reasonable doubt by the testimony of two witnesses or from the testimony of one witness and such corroborative circumstances as in your opinion is equivalent to the testimony of two witnesses, that the defendant did willfully and corruptly testify falsely as to some material matter in the judicial proceedings as alleged in the indictment." The objection to this instruction is that it fails to state that the testimony must relate to some material matter in issue or point in question, as required by the statute, and the objection is well founded. The first part of this instruction is in this language: "Before you can convict the defendant of willful and corrupt perjury as charged in the indictment, you must believe from the evidence that the defendant in the judicial proceedings alleged in the indictment after being duly sworn to tell the truth, did willfully and corruptly testify falsely to a matter material to the issues there involved, in manner and form as alleged in the indictment." The first instruction given for the People also, in substance, instructed the jury that to constitute perjury in this case it must be shown that the defendant swore willfully, corruptly and falsely in a matter material to the issues or point in question and after having taken a lawful oath in a judicial proceeding, etc. The testimony given by the defendant in the case in the county court and which was charged by this indictment and proved to have been false and known to be

false by the defendant, was, beyond all question, material to the issues then being tried in the county court. There is absolutely no dispute that the defendant swore in the county court to the very state of facts the testifying to which is charged by the indictment in this case to be perjury. Instructions similar to the one objected to by the defendant have been held by this court in other cases to be reversible error. In this case it is not perceivable how the defendant could have been prejudiced by the giving of the instruction in question when it is admitted that he did testify in the county court as charged and the testimony must be considered by everyone to have been material to the issue, and where the only real question in the case is whether or not the facts sworn to by the defendant in the county court were true or false. Where it can be said from the record that an error complained of cannot reasonably have affected the result of the trial the judgment of the trial court must be affirmed. *People v. Haensel*, 293 Ill. 33.

It is also assigned as error that the court erred in overruling the motion for a new trial on the ground of newly discovered evidence. The defendant made an affidavit in support of his motion for a new trial that he had discovered two witnesses, (naming them,) one of whom would testify that he passed along or by the place on the road in question the next day after the difficulty and saw tracks of a wagon on both sides of the highway at that point; that the other witness would testify to the same state of facts as the witness just referred to, and also that there were tracks that appeared to be made by a big wagon on both sides of the road, and that he noted that the tracks on the east side of the highway showed the horses were traveling north and that the tracks of the horses indicated that the wagon on the west was traveling south. The two newly discovered witnesses also made affidavit that they would both testify, in substance, as stated by the defendant.

The affidavits of these newly discovered witnesses are merely cumulative evidence and not decisive of the issues. A new trial should not have been granted upon the testimony of those two witnesses.

Aaron Rife also made affidavit for the defendant that shortly after the trial in the county court he had a conversation with Prosper Matlock concerning the trial, and that Prosper laughed much over the result and stated that that was one time Paris had it put over him; that Paris had told it just as it was and then got stuck; that Josiah had driven around Paris on the east side as he went north, and that they had cursed each other, and that he had decided to get even with Paris; that upon their return south down the road they had driven on the west side of the road in question. The witness Rife had been subpoenaed by the defendant to testify as a witness in this case. It is claimed by the defendant that he did not know what Rife knew until after the trial; that Rife told him that he would tell what he knew on the witness stand and not before, and that Rife disappeared and failed to appear and testify as a witness. There was no continuance asked on account of the absence of this witness. It does not appear that the defendant asked the court to call Rife as its witness after showing that Rife refused to tell defendant in advance what he knew, which was his right had he sought to invoke it. The defendant has not, therefore, used due diligence in ascertaining what this witness knew and having him testify on the trial. The testimony of Rife is rather remarkable and his delay in coming to his friend's relief tends to cast suspicion upon his testimony. It appears from the record that he is a brother-in-law of defendant, as shown by counter-affidavit, and there is absolutely no reason shown by the record, other than as already stated, why Rife should not have disclosed his evidence before the trial in the circuit court. His evidence is only in the nature of impeaching testimony and is vigorously denied in every particular

by Prosper Matlock in his counter-affidavit. It was not proper to consider the counter-affidavit, as the trial court indicated, but the defendant is not entitled to a new trial on account of the testimony of this witness, for want of due diligence in obtaining it earlier.

The defendant made an affidavit concerning the juror John Leturno, who separated for fifteen minutes from the other jurors. The defendant swears, as already indicated, that Leturno was absent nearly fifteen minutes; that at the close of the evidence and just before the reading of the instructions to the jury a recess of five minutes was ordered by the court and the jury were taken to the toilet room in the court house; that while in the toilet room the defendant saw Prosper Matlock enter the toilet room; that the defendant immediately opened the door of the toilet room and saw Prosper in conversation with Leturno, the juror aforesaid, and that upon defendant opening the door they each jumped and moved rapidly away. It was proper for the court to consider counter-affidavits on this question, and counter-affidavits were filed by the juror and by Prosper positively denying each and every allegation as to their meeting in the toilet or having any conversation. The bailiff in charge of the jury swore that he took special pains to keep the jury together and to prevent anyone from communicating with them; that he accompanied them to the toilet when they went there after the case had closed and went inside with them; that the jury remained together thereafter at all times, and that he observed Leturno and never at any time saw any person communicate with him or any improper conduct by him; that if any conversation had occurred in the toilet which could be heard from the door, between Leturno and Prosper, he would have been in a position to hear it; that he never heard the conversation and believes to a moral certainty that no such conversation ever took place, either in the toilet or elsewhere, and that he at no time saw Prosper attempt to converse with

any juror in the case. These three witnesses for the People are further corroborated by an affidavit of Alonzo E. Martin, formerly county truant officer and assistant county superintendent of schools, who testified that on the day of the trial he entered the court room about the time the case was closed and the jury were leaving the court room; that Prosper Matlock at that time was seated in the court room and that he sat down with him and talked to him for at least five minutes, and that during that time Prosper never left the court room. The court very properly overruled the motion for a new trial for all the reasons aforesaid.

The judgment of the circuit court is affirmed.

Judgment affirmed.

(No. 14585.—Judgment affirmed.)

THE W. A. JONES FOUNDRY AND MACHINE COMPANY,
Plaintiff in Error, *vs.* THE INDUSTRIAL COMMISSION
et al.—(AUGUST G. URBANSKI, Conservator, Defendant in Error.)

Opinion filed June 21, 1922.

WORKMEN'S COMPENSATION—*when rupture of blood vessel in brain is an accidental injury.* Where an employee, while working in a foundry, suffers the rupture of a blood vessel in the brain, which leaves him insane, the injury may be said to be accidental within the meaning of the Compensation act, and an award may be allowed at the suit of a conservator even though the employee was afflicted with arteriosclerosis and had a high blood pressure, so that he might have suffered a similar stroke under ordinary circumstances.

WRIT OF ERROR to the Circuit Court of Cook county;
the Hon. FRANK JOHNSTON, JR., Judge, presiding.

GALLAGHER, KOHLSAAT, RINAKE & WILKINSON, for
plaintiff in error.

GEORGE W. THOMA, and E. MARSHALL AMBERG, for defendant in error.

Mr. JUSTICE DUNN delivered the opinion of the court:

Stanislaw Golembiewski was an ironmolder thirty-nine years old, who had been in the employ of the W. A. Jones Foundry and Machine Company for twelve years prior to November 1, 1917. He was a steady worker but was addicted to the excessive use of intoxicating liquor and had had delirium tremens. He was afflicted with arteriosclerosis and had a high blood pressure. On November 1, 1917, he was working in the foundry, carrying molten metal and pouring it into flasks. In doing this work the metal, which was melted in a large cupola, was drawn off into a vat resting upon a buggy, which ran upon tracks in the foundry. From the vat the metal was poured into an iron ladle and carried by a handle extending across the center and about two feet on either side. The ladle and handles weighed about 65 pounds, and when filled with melted iron made a total weight of about 175 pounds, which was carried by two men to the flask into which the metal was poured. The temperature of the room was about eighty degrees though the weather outside was cold enough to require an overcoat. About the middle of the afternoon Golembiewski, who had been engaged two or three minutes before in the work which has been mentioned, was seen leaning against a flask and a few of the workmen were talking to him but he did not answer. The assistant to the foundry superintendent noticing that he appeared to be unconscious, sent for a doctor. Golembiewski was sent to an emergency hospital a few moments later and afterward was taken to the Robert Burns Hospital, where he remained for eight days, when he was taken to the County Hospital. He remained there for some months, and on April 25, 1918, an inquest of insanity was held, he was found to be insane, was committed to the State Hospital for the Insane at Dunning, and his insanity has

continued from that time. A conservator was appointed by the probate court of Cook county, who on April 7, 1920, made an application to the Industrial Commission for an award of compensation from Golembiewski's employer. On a hearing before an arbitrator the compensation was denied, but upon review by the Industrial Commission upon the same evidence that was heard before the arbitrator the commission set aside the decision and entered an award in favor of the claimant. The circuit court of Cook county affirmed the award, and the employer has sued out a writ of error to reverse its judgment on the ground that the record contains no evidence of any accident arising out of and in the course of the employment.

Aside from the testimony as to what occurred at the time Golembiewski was overcome in the molding room, Dr. A. N. Stober, the only physician who was a witness, testified, in response to a hypothetical question, that heavy exertion in a heated atmosphere might contribute toward the occurrence of a cerebral hemorrhage in a man whose condition was that of Golembiewski. It might cause a hemorrhage and paralysis, and a hemorrhage which produced paralysis might also interfere with the mental condition. He said that the high tension and excessive exertion in a heated room would have a tendency to raise the blood pressure, and when the blood pressure reaches a certain point some of the vessels in the body give way, causing a hemorrhage. The vessels which are broken are those branches in the middle cerebral artery. He testified that he had seen Golembiewski in the summer of 1919 at Dunning and examined him, and that he presented certain nervous symptoms of a lesion which the doctor assumed came from the cerebral hemorrhage, and he had a paralysis of the right side. He had motor aphasia and was lacking in mentality. He had a brain lesion established for some time,—a condition which rarely recovered,—and in the doctor's opinion an operation would not improve the condition of his mind. The only

cause, in his opinion, which would produce the condition the man was in would be plugging of an artery with some substance, such as a blood clot or an embolism. Such an obstruction in the blood stream disturbs the functions of the arteries and very often results in a rupture of the artery. Heavy drinking would make a man more susceptible to just what occurred. A man who was perfectly normal would probably not have been affected under those circumstances.

Golembiewski had an attack of a somewhat similar nature in 1916, when he fell on Blackhawk avenue and was disabled for about two weeks. He subsequently returned to work and worked steadily afterward. There was no evidence of unusually heavy work or an excessively high temperature or that either the work or the temperature was such as would have been likely to be injurious to a man in a normal condition, but the evidence of Dr. Stober tends to show that the work and the temperature might be expected to produce just such an injury as Golembiewski suffered, to a man whose arteries were in the condition in which his were.

In *Matthiessen & Hegler Zinc Co. v. Industrial Board*, 284 Ill. 378, we said: "The words 'accident' and 'accidental injury' imply * * * that an injury, to be accidental or the result of an accident, must be traceable to a definite time, place and cause, but if there is such a definite time, place and cause and the injury occurs in the course of the employment the injury is accidental within the meaning of the act and the obligation to provide and pay compensation arises. While it is not intended, and perhaps not possible, to give a definition of the words used in the act as applied to all possible circumstances, it may safely be said that an injury is accidental, within the meaning of the act, which occurs in the course of the employment unexpectedly and without the affirmative act or design of the employee." The time and place of Golembiewski's injury are certain. There is evidence tending to show that his exertion in his

work in the heat of the molding room was the cause, and it occurred in the course of his employment unexpectedly and without any act or design on his part. It is probably true that an injury of a similar character might have happened to Golembiewski by reason of moderate exertion in a moderate temperature and not in the course of his employment, or even that he might have received a similar stroke in the absence of any exertion at all, while sitting in his home or lying in his bed, and the result would perhaps have been the same, but he did not suffer any injury in that way as a result of his disease. He was overcome while he was at work, under circumstances which furnish an adequate cause for the result, and we will not indulge in conjecture as to what might have happened under other circumstances. He might have suffered this stroke in the same way if he had stayed at home and not worked that day, but he did not and he did suffer his stroke as the combined result of his disease and his work. The rupture of the blood vessel in the brain was an accidental injury, and although his existing disease predisposed him to an accident of this character, we have held that death under such circumstances may be said to have resulted from an accidental injury and is a proper basis for an award of compensation. (*Peoria Terminal Co. v. Industrial Board*, 279 Ill. 352.) In *Schroetke v. Jackson-Church Co.* 193 Mich. 616, it was held that the death of a watchman was accidental who had heart disease and died from heart failure induced by excitement on discovering a fire and exertion in attempting to extinguish it. The case of *Gilliland v. Ash Grove Lime and Portland Cement Co.* 104 Kan. 771, is substantially the same in principle.

The circuit court did not err in affirming the award, and its judgment is affirmed.

Judgment affirmed.

(No. 14576.—Judgment reversed.)

THE CITIZENS COAL MINING COMPANY, Plaintiff in Error,
vs. THE INDUSTRIAL COMMISSION *et al.*—(MARGARET
FUNK, Defendant in Error.)

Opinion filed June 21, 1922.

WORKMEN'S COMPENSATION—*when evidence does not support a finding that death was result of accidental injury.* Evidence that an employee was temporarily rendered unable to work immediately after doing heavy lifting in connection with his employment is not sufficient to support a finding that his death five months later was a result of the strain, where the employee continued at his work for two months and where expert witnesses testify that he had symptoms of cancer of the intestines, which could not have been caused by a strain recently received but which is a growth of two or three years.

WRIT OF ERROR to the Circuit Court of Sangamon county; the Hon. E. S. SMITH, Judge, presiding.

T. W. QUINLAN, for plaintiff in error.

KERR, MACDONALD & MURPHY, for defendant in error.

Mr. JUSTICE DUNN delivered the opinion of the court:

Henry Funk was employed by the Citizens Coal Mining Company as a miner, and on February 26, 1920, he sustained an injury in attempting to lift a coal car that was off the track back upon the track. He died on July 24, 1920. His widow presented a claim for compensation to the Industrial Commission and an award was made in her favor, which was confirmed by the circuit court of Sangamon county. A writ of error was allowed on petition of the mining company, which has presented the case on the sole proposition that there is no evidence in the record that the death of the deceased was the result of the accident.

The record contains very little satisfactory evidence from which to determine the cause of death. The deceased

was fifty-one years old and had apparently been in good health prior to the accident. Bernard Pulver, who was an apprentice working with him at the time, testified that in lifting the car Funk hurt himself in his stomach and bowels and had to sit down before he could pick up his tools. This was shortly after dinner. He picked up his tools, waited for Pulver to finish loading a car and then walked out. He could not walk at his usual gait but walked very slowly. He carried his pick out. He went home and rubbed his stomach and left hip with liniment, ate his supper and then went to bed. He returned to work the next day and worked every day until March 3, when he did not go to work but was sick in bed, and Dr. Barker, the family doctor, was then called for the first time. He found Funk suffering with a distended and obstructed bowel. The next day Funk returned to work in the mine. He had a similar trouble with obstruction of the bowels afterwards two or three times, but he continued to work at the mine during March and April. The first half of March the mine worked ten days, of which Funk worked eight; the first half of April the mine worked nine days, of which Funk worked six; and the second half of April the mine worked six days, of which Funk worked five. Dr. Barker testified that he took care of Funk a part of the time, off and on, for two months; that he never saw any signs of external violence, bruises or swelling of the abdomen, but there was a general bloating all over, due to gas. After he had had the other attacks of obstruction of the bowels which have been mentioned he was operated on, and Dr. Barker testified that a big ulceration was found on his bowel, on the descending colon, and there were some adhesions. He did not analyze the tissue but it looked like a cancerous growth. There was a Wasserman test, which showed positive. The ulceration could have been caused from syphilis, but the doctor did not think it could have been caused from a strain by lifting or pushing a car. Dr. Barker's testimony was weak-

ened by an inconsistent report which he had made to the Order of Red Men, stating, in answer to questions, that the disease from which Funk suffered was strain, which caused the inflammation of the bowels and obstruction for the relief of which the doctor operated. In answer to the question, "Did this illness result from injuries or surgical operation?" he answered, "Injuries," and in answer to the question, "How do you understand this disease was contracted?" he answered, "By pushing a car or lifting a car." This report was dated June 1, 1920, and the operation was performed before that time. The doctor stated on the stand that the report was not true to the facts; that it was a little over-liberal, and he had overdrawn it, to say the least. Dr. McCarthy saw Funk in March, when he had a severe pain all over the abdomen, especially in the lower left part. His bowels would not move. They had given him some strong cathartic with no result. The next morning he was removed to the hospital and his bowels moved. The doctor made an examination and saw a small mass in the lower left part of his abdomen and advised him to have X-ray pictures taken and stay for further treatment, but he got up and went home. The doctor testified that he made a tentative diagnosis of a cancerous growth and that a strain could not produce the symptoms he found there. Dr. Don Deal did not see Funk, but he testified that a strain could not cause a cancerous growth on the colon or a perforation of the bowels or an ulcer on the colon. It could not hasten the development of such a cancerous growth. Cancer of the bowels is a very slow growth, and it would take two or three years for a cancerous growth to develop to a point where it would obstruct the bowels.

There was no other evidence as to the cause of the death of the decedent. No witness expressed a decided opinion as to what was the cause. There were no visible effects of the injury. For two months after the injury the deceased worked, substantially, whenever there was work in

the mine. He suffered occasionally from obstruction of the bowels, but there is nothing in the evidence to connect that obstruction with the accident. The evidence does not furnish the basis for a reasonable conjecture that he died from an injury received in the mine.

The judgment will be reversed and the record of the Industrial Commission quashed.

Judgment reversed.

(No. 14635.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, vs. THE WOMAN'S HOME MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH, Appellant.

Opinion filed June 21, 1922.

1. CORPORATIONS—*statutes granting privileges or immunities do not ordinarily apply to foreign corporations.* Statutes granting powers, privileges or immunities to corporations apply only to domestic corporations unless the intent of an application to foreign corporations is clearly expressed.

2. SAME—*corporation is not a citizen within meaning of Federal constitution.* A corporation is not a citizen entitled to the equal protection of the laws within the meaning of section 2 of article 4 of the Federal constitution and of section 1 of the fourteenth amendment.

3. SAME—*foreign corporations cannot claim the privileges of a domestic corporation.* The State may prescribe the conditions upon which foreign corporations may transact business within the State and may assess a business or privilege tax in addition to the regular taxes assessed against property; and foreign corporations can not claim the same privileges as domestic corporations, nor is the State bound to give its exemption privileges on taxation to foreign corporations.

4. INHERITANCE TAX—*charitable corporation of another State is not exempt.* In the absence of an express provision of the statute a charitable corporation organized in another State but having an office in Illinois is not entitled to an exemption from the payment of an inheritance tax on its succession to property by a provision in a will under section 28 of the Inheritance Tax act.

5. TAXES—*exemption statutes are strictly construed.* Statutes exempting property from taxation are to be construed strictly.

APPEAL from the County Court of Cook county; the Hon. F. S. RIGHEIMER, Judge, presiding.

WILLIAM C. RIGBY, and URBAN A. LAVERY, (M. C. SLUTES, of counsel,) for appellant.

EDWARD J. BRUNDAGE, Attorney General, LEROY MILLNER, and A. M. EBERHARDT, for the People.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

Adele Edwards, a resident of Evanston, Illinois, died testate January 16, 1914. Under the fifth clause of her will she devised and bequeathed the residue of her estate to the Woman's Home Missionary Society of the Methodist Episcopal Church. The residue was appraised at \$11,109.53, and upon petition of the State the county court of Cook county held that the devise and bequest were subject to an inheritance tax and fixed the amount of the tax at \$443.38, and judgment was entered against the society for that amount. This appeal followed.

The Woman's Home Missionary Society of the Methodist Episcopal Church, appellant, is a charitable and benevolent society organized and incorporated under the laws of the State of Ohio. It has for many years maintained an office in the city of Chicago and still maintains such office. It has owned for many years, and still owns, maintains and conducts, orphanages and deaconess' homes for charitable purposes within this State. It collects money for its charitable purposes throughout the United States and expends such money solely for its charitable purposes throughout the several States of the Union and the possessions of the United States, and it expends a fair portion of its income upon its charitable institutions in the State of Illinois.

The county court held that as appellant is a foreign corporation it is not exempt from taxation under the Inheritance Tax law of this State, and the sole question on this

appeal is whether or not the appellant, a benevolent and charitable organization organized in the State of Ohio, is exempt from payment of such tax under the law of this State. To be exempt from payment of this tax appellant must come within section 28 of the Inheritance Tax law, which is an amendatory act of 1901, adopted for the purpose of relieving certain devises and bequests or gifts from the operation of the original act of 1895. The amendatory act reads as follows: "When the beneficial interests of any property or income therefrom shall pass to or for the use of any hospital, religious, educational, bible, missionary, tract, scientific, benevolent or charitable purpose, or to any trustee, bishop or minister of any church or religious denomination, held and used exclusively for the religious, educational or charitable uses and purposes of such church or religious denomination, institution or corporation, by grant, gift, bequest or otherwise, the same shall not be subject to any such duty or tax, but this provision shall not apply to any corporation which has the right to make dividends or distribute profits or assets among its members." (Hurd's Stat. 1921, p. 2745.)

There is no question that the appellant is a benevolent and charitable corporation and that all the funds received by it are expended for benevolent and charitable purposes, as aforesaid. If it were a corporation of this State there could be no doubt as to its right of exemption from said tax. The amendatory act contains no language that indicates that it was the legislative intent that its provisions should apply to corporations created under the laws of another State of the United States. The rule of construction accepted by this court is, that an act of the legislature granting powers, privileges or immunities to corporations must be held to apply only to corporations created under the authority of this State and over which this State has the power of visitation and control, unless the intent that the act shall apply to other than domestic corporations is plainly

expressed in the terms of the act. (*In re Estate of Speed*, 216 Ill. 23; *People v. Western Seaman's Friend Society*, 87 id. 246; *Balleis' Estate*, 144 N. Y. 132; *In re Prime's Estate*, 136 id. 347; *Humphreys v. State*, 70 Ohio St. 67; DosPassos on Inheritance Tax Laws,—2d ed.—sec. 36.) Under these authorities it is clear that appellant is not exempt from the payment of an inheritance tax on its succession to the property under the will. The rule is, also, that exemption statutes of taxation are to be construed strictly.

It is contended by appellant that the fact that it has an office in this State and owns, maintains and conducts orphanages and deaconess' homes for charitable purposes within this State, distinguishes this case from the *Speed case*, *supra*. It was expressly stated in *People v. Western Seaman's Friend Society*, *supra*, that such facts would make no difference in the decision of such a case. Appellant being organized under another State, its organization and its business are controlled by the laws of that State. It placed itself within the jurisdiction of the State within which it was organized, and it is therefore not a person that has placed itself within the jurisdiction of this State. A corporation is not a citizen within the meaning of section 2 of article 4 and of section 1 of the fourteenth amendment of the Federal constitution. The taxing, therefore, of the right of succession to property willed to appellant in this case is not abridging the privileges or immunities of a citizen of the United States, and as it has not placed itself within the jurisdiction of this State, such taxation is not denying to any person within the jurisdiction of this State the equal protection of the law. (*In re Estate of Speed*, *supra*.) "A corporation exists only by virtue of the law creating it and has no existence beyond the boundaries of the State where such law has force. It cannot exercise any rights or privileges in a foreign jurisdiction unless permitted to do so by express or implied permission of the foreign State, and it is on the principle of comity that States per-

mit corporations of other States to act within their boundaries." *Barnes v. People*, 168 Ill. 425.

This court has often held that this State may prescribe the conditions upon which corporations can come into this State and transact business, and even assess a tax against them on their business or the amount of the business they transact, as a business or privilege tax in addition to the regular taxes assessed against their property. There is no constitutional provision that declares against such taxation, even though such business or privilege tax is not taxed against the same kinds of corporations organized in this State, and section 28a, 56, of our Incorporation act does not prohibit such practice. Foreign corporations cannot, therefore, claim the same privileges in their demands to transact business in this State as domestic corporations, and it has ever been held that a State may contract with them or charge them for the privilege of transacting their business within its borders. It is equally clear that a State is not bound to give its exemption privileges on taxation to foreign corporations, and foreign corporations can claim no such exemption unless the statute plainly and expressly grants it.

The argument of appellant is not tenable that such taxation of it is prohibited by sections 1 and 2 of article 9 of the constitution of this State. The same argument was apparently made in the *Speed case*, *supra*, and the same holding was made there. There are other States, notably Louisiana and California, that have made different holdings upon statutes similar to this one of ours. We have great respect for those courts, but the holdings of New York and Ohio courts are more persuasive and are in accord with the previous holdings of this court, and we see no reason for changing our former holdings.

The judgment of the county court is affirmed.

Judgment affirmed.

(No. 14609.—Reversed and remanded.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. CHARLES KENNEDY, Plaintiff in Error.

Opinion filed June 21, 1922.

1. CRIMINAL LAW—*when information verified by State's attorney is sufficient.* An information which states probable cause and is supported by affidavit is sufficient under the bill of rights where it is verified by the State's attorney, even though he does not of his own personal knowledge know the facts but derives such knowledge from others which satisfies him of the existence of the facts, as knowledge of the existence of facts may arise from a confession or any other source which enables the person verifying the information to swear to its truth.

2. SAME—a plea is essential to a criminal trial. Under section 3 of division 13 of the Criminal Code a plea is essential to constitute an issue to be tried in a criminal case whether the offense charged is a misdemeanor or a felony, as the matter of a plea is not a mere formality; and the question of the want of a plea is properly raised by general motion in arrest of judgment.

CARTER, J., dissenting.

WRIT OF ERROR to the County Court of Lake county;
the Hon. PERRY L. PERSONS, Judge, presiding.

SIDNEY H. BLOCK, and GEORGE W. FIELD, for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, and ASHBEL V. SMITH, State's Attorney, for the People.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On June 8, 1921, a constable of Lake county, by authority of a search warrant issued by a justice of the peace under the act commonly called the Search and Seizure act, entitled "An act to restrict the manufacture, possession and use of intoxicating liquor within prohibition territory," (Laws of 1919, p. 930,) searched premises occupied by the plaintiff in error, Charles Kennedy, and made return that

he had seized intoxicating liquors specified in the return. On the same day an information containing ten counts was filed in the county court by the State's attorney charging plaintiff in error with a violation of different provisions of the act. The third count charged that the plaintiff in error on May 10, 1921, was convicted of violating section 3 of the act and subsequently again unlawfully kept for sale intoxicating liquor. There was a trial, and the jury returned a verdict finding the defendant guilty in manner and form as charged in the third count. Motions for a new trial and in arrest of judgment were made and overruled and the plaintiff in error was sentenced to imprisonment in the county jail for a period of ninety days and to pay a fine of \$500. A writ of error was sued out of this court on the ground that a constitutional right of the plaintiff in error was violated by a trial upon an insufficient information.

The information was verified by Ashbel V. Smith, State's attorney, stating that the matters and things therein set forth were true as therein stated. The People introduced evidence tending to prove a violation of the act in question, and the defendant offered no evidence on that question but called the State's attorney as a witness, and he said that he did not know personally that the matters and things set forth in the information were true but he derived his information from others. A motion was then made that all evidence be excluded from the record because the verification, in fact, was not made upon personal knowledge but upon information, in violation of section 6 of the bill of rights, and the motion was denied. That section of the bill of rights declares that no warrant shall issue without probable cause supported by affidavit, and a verification stating that a person has been informed of the existence of facts and believes in their existence will not support a warrant. (*People v. Clark*, 280 Ill. 160.) The information in this case was not of that character but was supported by affidavit in positive terms and complied with the

provision of the constitution. The State's attorney was not on trial, and the fact that he did not of his own personal knowledge know the facts but derived such knowledge from others which satisfied him of the existence of the facts was not ground for claiming a violation of the constitutional right. Knowledge of the existence of facts may arise from a confession or any other source which enables the person verifying the information to swear to its truth. (*People v. Boykin*, 298 Ill. 11.) The information stated probable cause and was supported by affidavit, and the court did not err in overruling the motion.

The defendant appeared in court and was furnished with a copy of the information, and a motion was made to quash, which was overruled, but the record does not show any plea to the information. Section 3 of division 13 of the Criminal Code contains this provision: "Upon the arraignment of a prisoner, it shall be sufficient, without complying with any other form, to declare orally, by himself or his counsel, that he is not guilty; which plea shall be immediately entered upon the minutes of the court by the clerk, and the mention of the arraignment and such plea shall constitute the issue between the people of the State and the prisoner."

This court has consistently and uniformly held that the statute must be complied with and that a plea is essential to constitute an issue to be tried. In *Johnson v. People*, 22 Ill. 314, which was a prosecution for a misdemeanor, the above provision of the Criminal Code was quoted and it was held that a plea was essential to the formation of an issue to sustain a verdict; that without it there was nothing to be tried by the jury, and that the judgment in that case should have been arrested for want of a plea. In *Yundt v. People*, 65 Ill. 372, where the charge was a felony, the record failed to show that the defendant was arraigned or any plea filed, and it was decided that there was no issue to try and the defendant could not be properly sentenced.

In *Hoskins v. People*, 84 Ill. 87, where larceny was charged, the defendant waived arraignment, copy of indictment, list of jurors and witnesses, but no plea was entered. The court reversed the judgment and remanded the cause so that the accused might be arraigned and plead to the indictment before he should be again placed on trial. In *Parkinson v. People*, 135 Ill. 401, which was a prosecution for a felony, a jury was impaneled and sworn and a witness sworn and partly examined when it was discovered there was no arraignment or plea. The defendant was then arraigned and pleaded not guilty and the trial was then proceeded with from the point already reached. The defendant moved in arrest of judgment based on these facts, and the court held that if there had been an arraignment in fact and a failure to make a minute of the same a record might be made, but the court erred in overruling the motion in arrest of judgment.

Counsel for the People concede that under the decisions of this court a trial without a plea is fatal error but say that in cases of misdemeanor a different rule prevails in the Federal courts and a majority of the State courts; that some State courts have reversed and overruled former decisions; that the statutory requirement of a plea is a mere technicality without merit and represents a period when the law was very solicitous for the protection of the rights of persons accused of crime and that it ought to be changed. The court has relaxed rules of procedure where there was reasonable ground for doing so, and in *Fitzpatrick v. People*, 98 Ill. 259, where the charge was malicious mischief, the defendant pleaded to the indictment that he was not guilty, and it was held that the ancient formality of arraignment by reading the indictment to the defendant was not necessary and the statutory requirement for furnishing a copy of the indictment took its place. In *Kelly v. People*, 132 Ill. 363, it was again held that furnishing a copy of the indictment before arraignment made the reading of the in-

dictment on arraignment unnecessary. The want of a plea is not of like nature and is not a mere formality. It is true that a defendant participating in a trial knows the question of his guilt or innocence is being tried, and it is equally true that a defendant who is in court and hears the witnesses knows what charge is made against him, but that fact does not dispense with the requirement of an information by which the accused is informed of the offense with which he is charged. (*Parris v. People*, 76 Ill. 274.) The same rule was again stated in *Gould v. People*, 89 Ill. 216, where the defendants were prosecuted in a county court for a riot, upon an affidavit charging that the riot was committed. Judgment was reversed both because of the want of an information and any plea by the defendants. The court said that a plea was indispensable to a trial unless the accused stands mute, and the judgment was reversed and the cause remanded. With these decisions before the legislature it has not been deemed necessary to change the statute, and the reasons offered by counsel do not seem to us to make it obligatory upon the court to change the law, which has been long settled and is well known to every State's attorney.

Counsel for the People say that the above question was not raised in the trial court. The record shows a motion in arrest of judgment, which was general and not limited in any way, and the claim is not supported by the record.

Numerous other errors are assigned, and counsel for the People admit that errors occurred upon the trial which they regard as harmless. They are of such a nature as are not likely to occur upon another trial and will not be noticed.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Mr. JUSTICE CARTER, dissenting.

(No. 14656.—Decree affirmed.)

GERALDINE DUSTIN, Appellee, *vs.* MARGARET HELEN CULL
BROWN *et al.* Appellants.

Opinion filed June 21, 1922.

APPEALS AND ERRORS—*decree carrying out remanding order of former appeal must be affirmed.* A decree carrying out correctly the remanding order of the Supreme Court on a former appeal must be affirmed on a second appeal notwithstanding there was no petition for rehearing, as the first decision becomes the law of the case, which binds the chancellor, and the appellants cannot on the second appeal change their position and urge new questions.

APPEAL from the Circuit Court of Logan county; the
Hon. FRANK LINDLEY, Judge, presiding.

DAILEY, MILLER, McCORMICK & RADLIFF, and McCORMICK & MURPHY, for appellants.

COVEY & WOODS, for appellee.

Mr. CHIEF JUSTICE THOMPSON delivered the opinion
of the court:

This appeal is from a decree entered by the circuit court of Logan county pursuant to a judgment of this court on a former appeal. In the opinion filed at a former term (*Dustin v. Brown*, 297 Ill. 499,) we held that Mary E. Dustin, under the second clause of the will of her father and pursuant to a decree in partition, took a life interest in a 105-acre farm and that the remainder in fee vested in her children; that on the death of her only child, Julian, in 1898, Mary E. Dustin and her husband, William L. Dustin, each inherited an undivided one-half of the remainder in fee; that in 1901, on the birth of a second child to Mary E. Dustin, the interests of the parents were cut down so that they were then each vested with an undivided one-fourth interest in the remainder in fee; that two judgments for comparatively small amounts were entered against Dus-

tin and executions issued thereon and levies made and sales had thereunder; that the sheriff's deed issued October 26, 1899, conveyed to appellant Brown's predecessor in title an undivided seventy-second part of the interest of Dustin in the farm and to appellant Corwine an undivided twenty-eighth part of said interest; that appellants' contention that there was a mutual mistake in the deed and that the deed should have conveyed to Brown's predecessor an undivided 72/100ths of the interest of Dustin and to Corwine an undivided 28/100ths of said interest could not be sustained, and that the chancellor erred in decreeing a reformation of the deed and declaring appellants invested as tenants in common with all of the right, title and interest of William L. Dustin in said farm. The decree was reversed and the cause remanded, with directions to enter a decree finding the rights of the parties in accordance with the views expressed in the opinion.

When the case was before this court at the former hearing appellants apparently relied upon the sheriff's deed as the basis of their title, but they now take an entirely different position and contend that, regardless of what was said in the sheriff's deed, the legal effect of it was to convey to appellants all the right, title and interest of William L. Dustin in the lands involved. The decision of this court on the former hearing was not questioned by petition for rehearing or otherwise and the decision has become the law of this case. If appellants were not satisfied with what was said in the former opinion and with the decision of the court, they could, by a method provided by the rules of the court, have pointed out to the court wherein it had erred, and, having failed to avail themselves of this opportunity to file a petition for rehearing, they cannot be heard now to question the former decision. When the cause was re-instated in the circuit court the chancellor could do nothing but enter a decree in accordance with the remanding order, and this he did. In finding the rights of the par-

ties he decreed that appellant Brown is seized of an undivided seventy-second part of an undivided one-fourth interest in the remainder in fee and that appellant Corwine is seized of an undivided twenty-eighth part of an undivided one-fourth interest in the remainder in fee, both interests being subject to being further diminished in the event of other children being born to Mary E. Dustin. This decree is in accordance with the remanding order and is affirmed.

Decree affirmed.

(No. 14449.—Writ awarded.)

THE PEOPLE *ex rel.* Robert E. Crowe, State's Attorney,
Petitioner, *vs.* HARRY M. FISHER, Judge, Respondent.

Opinion filed June 21, 1922.

1. CRIMINAL LAW—*habeas corpus is not proper remedy to correct errors in criminal case.* The writ of *habeas corpus* is not a substitute for a writ of error and cannot be used to correct errors in an information or irregularity in the proceedings in a criminal case, and where the municipal court has jurisdiction of the subject matter and of the person of a defendant who is charged with a misdemeanor, the circuit court cannot entertain a writ of *habeas corpus* to review the judgment of the municipal court sentencing the defendant to the house of correction.

2. SAME—*jury may be waived by defendant charged with misdemeanor.* A jury may be waived in a case involving a misdemeanor, and such waiver may be oral or in writing and no particular form is necessary.

3. SAME—*an infant above the age of ten years defends as an adult.* The Criminal Code has fixed at ten years the age below which there is a want of criminal capacity, and when an infant above this age stands charged with a crime he appears and defends in person or by attorney, the same as an adult, and if charged with a misdemeanor he may waive a jury.

4. SAME—*circuit judge has no authority to parole a prisoner by habeas corpus—mandamus.* The authority to pardon or parole a prisoner cannot be exercised by a judge of the circuit court on a writ of *habeas corpus*, and where such an order for the release of a prisoner is entered, the Supreme Court has original jurisdiction, on a petition for *mandamus*, to order the circuit judge to expunge the void order from the records.

ORIGINAL petition for *mandamus*.

EDWARD J. BRUNDAGE, Attorney General, and ROBERT E. CROWE, State's Attorney, (EDWARD E. WILSON, HENRY T. CHACE, JR., CLYDE C. FISHER, JAMES A. SCOTT, CHARLES C. ROE, and ALVA L. BATES, of counsel,) for petitioner.

HENRY A. BERGER, for respondent.

Mr. CHIEF JUSTICE THOMPSON delivered the opinion of the court:

An original petition was filed in this court in the name of the People, on the relation of the State's attorney of Cook county, praying for the issuance of a writ of *mandamus* to compel Harry M. Fisher, one of the judges of the circuit court of Cook county, to expunge from the records of said court an order releasing and discharging Hyman DeVorken from the house of correction of the city of Chicago. The respondent demurred to the petition. DeVorken was granted leave to intervene and filed his answer to the petition, and the petitioner demurred to this answer. The cause has been argued and submitted for decision on the issue of law raised by these demurrers.

The following facts are related in the petition: April 22, 1921, the case of the People against Hyman DeVorken came on for hearing before Charles F. McKinley, one of the judges of the municipal court of Chicago, on an information charging that DeVorken "on the 19th day of April, A. D. 1921, at the city of Chicago, aforesaid, did then and there carry upon his person and concealed upon his person a deadly weapon, to-wit, a loaded revolver, without a written license therefor, in violation of section 4 of the Sadler law, in force and effect July 1, 1919, contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of Illinois;" that DeVorken, having been duly advised by

the court as to his right to a trial by jury, waived in writing a trial by jury; that he was duly arraigned and pleaded not guilty; that a trial was had by the court without a jury and DeVorken was found guilty of the offense charged in the information; that he was thereupon sentenced to confinement at labor in the house of correction of the city of Chicago for the term of one year; that December 13, 1921, a petition for a writ of *habeas corpus* was presented to Harry M. Fisher, one of the judges of the circuit court of Cook county; that the petition was thereafter amended; that the amended petition alleged that DeVorken was detained and imprisoned in the house of correction unjustly and contrary to law; that the jury waiver which was signed by him, and upon which the court assumed to acquire jurisdiction of him, set out that it was a jury waiver in a case in which DeVorken was charged with a violation of section 4 of the Sadler law; that there is no law known as the Sadler law, and that therefore DeVorken did not waive a jury in a case wherein he was charged with a violation of any section of the Criminal Code; that DeVorken was under the age of twenty-one years and of the age of seventeen years at the time of the trial of said cause and could not legally sign a jury waiver; that the court had no authority to try the cause without the assistance of a jury where no legal and binding jury waiver had been filed, and that the court was without jurisdiction to enter the judgment finding DeVorken guilty; that on the same day DeVorken was charged by information with having in his possession a burglar's jimmy, a pick-lock and several skeleton keys, in violation of the ordinances of the city of Chicago; that he was likewise tried by the court without a jury for this offense; that he was found guilty and sentenced to pay a fine of \$200 and costs, and was committed to the house of correction until the fine and costs were paid or worked out at the rate of fifty cents a day, provided the imprisonment should not exceed six months, and that he had been

confined in the house of correction for seven and a half months. The petition concluded with the usual prayer for release from unlawful detention and imprisonment. In his return to the writ of *habeas corpus* Joseph Siman, superintendent of the house of correction, stated that he was holding DeVorken by virtue of a warrant of commitment from the municipal court and attached a copy of such warrant to his return. A colloquy between court and counsel covering fourteen printed pages is set out in the petition, and at the conclusion of this recital appears the court's order, which reads: "When they take a boy seventeen years old and send him to the house of correction for a year I am going to discharge him. (Addressing the defendant): I am going to give you a chance, but you will have to behave yourself. The relator is discharged." These facts are admitted by the demurrer of respondent and the answer of DeVorken.

It is contended by respondent (1) that this court has no jurisdiction to entertain this original petition for a writ of *mandamus*; and (2) that the circuit court had jurisdiction of the subject matter and DeVorken in the *habeas corpus* proceeding, and that this court has no jurisdiction to order the circuit court to expunge its order from the records. Every question presented in this case has been repeatedly decided by this court contrary to the contentions of respondent. Granting that the original information on which DeVorken was prosecuted was defective and that there was some irregularity in the proceedings, *habeas corpus* is not the proper remedy to correct these errors. It is not a substitute for a writ of error and cannot be made to perform its functions. (*People v. Zimmer*, 252 Ill. 9; *People v. Foster*, 104 id. 156.) The offense with which DeVorken was charged was a misdemeanor punishable by a fine or imprisonment in the county jail, or both. The municipal court clearly had jurisdiction of the subject matter and of defendant, and when this appeared the circuit court should have refused to entertain the petition for a writ of *habeas corpus*.

That a jury may be waived in cases involving misdemeanors is established by repeated decisions of this court, (*Zarresseller v. People*, 17 Ill. 101; *Brewster v. People*, 183 id. 143; *Paulsen v. People*, 195 id. 507;) where the authorities have been reviewed and the questions involved fully discussed. The act of June 17, 1893, requiring that the waiver of a jury trial must be in writing being unconstitutional, (*Sturges & Burn Manf. Co. v. Pastel*, 301 Ill. 253,) the waiver may be oral or in writing, and no particular form is necessary. The Criminal Code fixes the age below which there is a want of criminal capacity at ten years, and when an infant above this age stands charged with a crime he appears and defends in person or by attorney, the same as an adult. (*Bartley v. People*, 156 Ill. 234; *Cutter v. People*, 184 id. 395; 1 Wharton on Crim. Law,—11th ed.—123; 2 Bishop's New Crim. Proc.—2d ed.—772; 22 Cyc. 626.) From the order that was entered in the *habeas corpus* proceeding it appears that the judge used the writ to release the prisoner on parole. The law of this State vests the authority to pardon or parole in another department of the government and the judiciary have no right to usurp this power. The order of Judge Fisher being absolutely void, this court has the clear right, and it is its duty, to order him to expunge the void order from the records. *People v. Zimmer, supra*; *People v. Green*, 281 Ill. 52; *People v. Windes*, 283 id. 251.

The order discharging DeVorken was made without jurisdiction, and a writ of *mandamus* is awarded commanding the circuit court of Cook county to expunge the void order from the records of that court in accordance with the prayer of the petition.

Writ awarded.

(No. 14577.—Reversed and remanded.)

THE SPRINGFIELD DISTRICT COAL MINING COMPANY, Plaintiff in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.*—
(F. B. RICHTER, Defendant in Error.)

Opinion filed June 21, 1922.

WORKMEN'S COMPENSATION—*when award for complete disability is not sustained by the evidence.* An award for permanent total disability to a mine examiner is not sustained by evidence which shows merely that he was temporarily overcome by breathing bad air in the mine, while the uncontradicted testimony of a physician who made several examinations of the claimant is that the permanent disability of which he complains is the result of a disease which has no connection with the accidental injury.

WRIT OF ERROR to the Circuit Court of Sangamon county; the Hon. E. S. SMITH, Judge, presiding.

T. W. QUINLAN, for plaintiff in error.

KERR, MACDONALD & MURPHY, for defendant in error.

Mr. JUSTICE STONE delivered the opinion of the court:

Defendant in error, F. B. Richter, was employed by plaintiff in error on March 19, 1920, as a mine examiner. An explosion occurred in the mine on that day, about four o'clock in the afternoon. The defendant in error, on going into the mine, found the doors and means of stopping the openings blown out and smoke and gas were escaping from the mine to such an extent that he was compelled to leave; that when he arrived at the engine-house he fell to the floor; that he soon recovered and went back for the purpose of filling the doors and openings with sheeting, and while so engaged became overcome to such an extent that he again fell. The top boss of the mine, who was assisting in the work, advised the defendant in error that he should not remain there longer. He thereupon left the mine and upon reaching the outside again fell, though at no time

did he lose consciousness. He arose and left the mine without assistance.

Defendant in error testified that he had never had difficulty with breathing before the injury but ever since he has had difficulty in getting a sufficient quantity of air in his lungs; that any unusual exercise exhausts him; that he finds his appetite is poor; that his knees become weak when he attempts to engage in labor. The record shows that he went back to work on the day following the explosion and worked as mine examiner until the 7th of April, when he went to the hospital on the advice of his physician and remained there about ten days; that upon his return, his position having been filled by the employment of another man, he was given what is known as company work, which called for more physical exertion than that of mine examiner; that he was employed at this occupation for about sixteen days, when, as he testified, he was compelled to give it up. He further testified that he had not done any heavy work for sixteen years; that he was then sixty-five years of age; that while doing company work he threw up some blood, but that he said nothing to anyone connected with the respondent about having done so.

The only other testimony in the record was that of Dr. C. L. Patton, to whom defendant in error had gone as his physician prior to his going to the hospital. Dr. Patton testified that he examined defendant in error on April 9; that at that time he complained of loss of weight, loss of strength, failure of appetite and a pain in swallowing, behind the breast bone; that at the time of the examination he weighed 135 pounds; that by his statement he had, a few months previous to that time, weighed 145 pounds, and a few years previous had weighed 161 pounds; that he explained to the doctor the facts regarding the explosion; that he was in the hospital for a period of ten days under the doctor's observation; that four examinations were made of the stomach contents after giving him certain test

meals; that these examinations revealed the absence of free hydrochloric acid and the presence of blood and bacteria incidental to irritation of food in the stomach; that the blood count was normal; that an X-ray examination showed a raggedness in the upper portion of the stomach, denoting ulceration; that from these examinations the witness concluded that the defendant in error was suffering from an early cancer of the stomach. Dr. Patton also testified that there was no connection between these conditions and any condition that might be caused by coming in contact with mine gas; that carbonic acid gas, which defendant in error testified was what he had breathed, could have no other than a temporary effect on the stomach; that mine gas is an inorganic compound, and its effect passes away when the patient is removed to the fresh air. He also testified that the absence of free hydrochloric acid in the stomach is due to cancer; that the difficulty in breathing, of which the defendant in error complained, was due to fixation of the chest wall, due to age; that the blood count showed no evidence of there having been at any time any presence of carbon monoxide; that carbonic acid gas does not produce blood changes.

The commission entered an award for \$12 per week for 291 weeks, and thereafter a pension for life for the reason that the injury sustained caused complete disability, which renders the applicant wholly incapable of doing any work. The award was confirmed by the circuit court.

There is no evidence in the record tending to show that the loss of weight and strength and failure of appetite are in any way traceable to the difficulty in breathing of which the defendant in error complains but all of the testimony in the record tends to show the contrary. Assuming every statement made by defendant in error to be true, there is nothing in it that in any way rebuts the testimony of Dr. Patton, and the situation presented is that of a medical explanation of conditions described by the applicant, which

explanation is entirely unrefuted or uncontradicted. In that condition of the record it cannot be said that defendant in error has sustained the burden cast upon him to prove his case by preponderance of the evidence. The evidence in the case furnishes no basis for the finding that the physical conditions complained of by the defendant in error are traceable to his having come in contact with carbonic acid gas on the occasion described. This being true, it seems clear that the decision of the commission cannot be sustained.

The judgment of the circuit court confirming the award will therefore be reversed and the cause remanded, with directions to that court to remand the cause to the commission for hearing further evidence, if defendant in error be so advised.

Reversed and remanded, with directions.

(No. 14599.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. NICHOLAS KORAK, Plaintiff in Error.

Opinion filed June 21, 1922.

1. CRIMINAL LAW—*what is sufficient to prove corpus delicti.* In a prosecution for the crime against children it is not necessary to establish the *corpus delicti* by direct evidence, but it may be established by proof of facts and circumstances which show, beyond a reasonable doubt, that the crime has been committed.

2. SAME—*what testimony is competent without corroboration of expert witness.* In a prosecution for the crime against children the mother of the girl may testify as to the character of stains found on the girl's clothing and may state that they appeared to be of the character of a seminal discharge, even though there was no examination by an expert and no expert testimony taken, and it is for the jury to determine the weight to be given the mother's testimony.

3. SAME—*when letter written by defendant is admissible against him.* In a prosecution for the crime against children, a letter written by the defendant to the father of the girl acknowledging his guilt in general terms but without naming the offense and asking

for leniency and that the girl's mother forgive him is admissible as an admission, and it is for the jury to determine whether the admission of guilt contained in the letter refers to the crime with which the defendant was charged.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. JOSEPH H. FITCH, Judge, presiding.

JOHN T. BYRNES, for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, ROBERT E. CROWE, State's Attorney, and EDWARD C. FITCH, (HENRY T. CHACE, JR., EDWARD E. WILSON, and CLYDE C. FISHER, of counsel,) for the People.

MR. CHIEF JUSTICE THOMPSON delivered the opinion of the court:

This writ of error is prosecuted to review a judgment of the criminal court of Cook county finding plaintiff in error, Nicholas Korak, guilty of the crime against children and sentencing him to imprisonment in the penitentiary.

January 10, 1920, plaintiff in error was rooming at the home of Frank and Mary Sablich. Josephine Pozgaj, the seven-year-old niece of Sablich, was also temporarily residing in this home. She slept in a room with the six-year-old son of Mr. and Mrs. Sablich. There were two beds in this room,—one for each of the children. Plaintiff in error roomed with Frank Civinchi, across the hall from this room. About eleven o'clock in the evening Mrs. Sablich went to the children's room, and while examining the children she found that Josephine's drawers were wet. She covered her better and told her she would talk to her in the morning. When she went to the children's room in the morning she saw plaintiff in error come out of the room. She found Josephine in bed with a nickel in her hand and again found her drawers wet. She testified that she knew the difference between the appearance of urinous stains and the stains of the seminal discharge of a man, and that the

fluid with which Josephine's drawers were stained was of the character of semen. She called her husband and plaintiff in error and they came to the room. Josephine was then sitting on a chair, dressing herself. Mrs. Sablich told her husband, in the presence of plaintiff in error, what she had found and charged plaintiff in error with taking indecent liberties with the little girl. Plaintiff in error told her that she could not believe all that children said and that the little girl told lies about him. He admitted that he gave Josephine a nickel, but said he gave it to her because she wanted to buy candy with it. Josephine then said to him that he had done things to her many times and that he gave her the nickel and told her not to tell anyone. Plaintiff in error made no reply to Josephine but picked up his coat and hat and left the house. All of this testimony went in without objection. The next day plaintiff in error wrote the following letter to Frank Sablich:

"CHICAGO, January 11, 1920.

"*Dear Friend Franjo*—I acknowledge my guilt, vz., that I was misguided when the thought occurred to me to do that. * * * Therefore, I, your friend, am asking to intercede with your wife so she may forgive me. I shall never again appear under your roof, inasmuch as I know well what will be coming to me if this goes before the court. Absolve me of more agony in the future, as I have confidence that you will do so, as my friend. I shall be thankful in advance, and I ask once more that your wife may forgive me. There is no man who would not make some mistake. Read this well and think it over. Do not, however, tell anybody what I am writing you, as this would be a serious thing to do, inasmuch as I am pronouncing my own sentence in advance if this goes before the court. If you have taken no action, please, once more, forgive me as a friend of mine, I being a miserable creature.

"Yours,
NIKOLA KORAK."

Josephine was called to the stand, but after a preliminary examination the court held that she was incompetent to testify. She had attended for a short time a Croatian school but had not attended the public schools.

Frank Sablich testified that plaintiff in error asked him to have Mrs. Sablich say that he called her a whore and a

bitch, so that he could say he wrote the letter to apologize to her for calling her bad names; that he proposed that the letter be changed so that it would place the charge on Civinchi, who was then in Europe, and that if the change were made he would pay him what was right. Frank Pozgaj, father of Josephine, testified that plaintiff in error wanted him to have the letter destroyed, and said to him that it would be better to have a couple of hundred dollars than to pay money to lawyers.

Plaintiff in error testified that he was forty-five years old; that he had lived in this country ten years; that he had worked as stock-keeper for the International Harvester Company for seven years, and that he had never before been in any trouble. He denied that he was in Josephine's room during the evening of January 10 or the morning of January 11, and denied that he touched Josephine or that he did anything to cause the wet condition of her clothing or the bed. He admitted that he wrote the letter which was received in evidence because he wanted to apologize to Mrs. Sablich for the language he had used toward her and wanted to avoid being arrested and fined for this conduct; that he did not in the letter acknowledge that he was guilty of taking indecent liberties with Josephine, and that he had no intention of making any such acknowledgment because he had done nothing to her. He charges that the prosecution is the result of an effort on the part of the Sablichs to deprive him of his share in the restaurant which they owned as partners. He claims to have furnished all of the money that the partnership had to establish the business and that the Sablichs furnished the labor for conducting the restaurant.

The principal contention of plaintiff in error is that there is an entire want of proof of the *corpus delicti*. This contention is without merit. It is not necessary to establish the *corpus delicti* by direct evidence. It may be established by the proof of facts and circumstances which show be-

yond a reasonable doubt that the crime has been committed. (*Carlton v. People*, 150 Ill. 181; *People v. Spencer*, 264 id. 124; *Bines v. State*, 118 Ga. 320, 12 Am. Crim. Rep. 205; 1 Wharton on Crim. Law,—11th ed.—chap. 11.) There is sufficient evidence in the record to establish the *corpus delicti* without considering the letter written by plaintiff in error.

Plaintiff in error contends that the court erred in permitting Mrs. Sablich to state the character of the stains on the bed and on Josephine's clothing, his contention being that no person is able to say absolutely that a certain substance is semen unless the substance be submitted to microscopical examination by an expert. Conceding that a layman could not tell with the naked eye the character of the substance found on Josephine's clothing, it was competent for Mrs. Sablich to describe the substance and to state that it appeared to her to be of the same character as the seminal discharge of a man. It was for the jury to determine the weight to be given her opinion.

Plaintiff in error states in his brief that it was error to give People's instructions 4, 5 and 6, but he does not point out in his argument wherein these instructions are erroneous. We have examined the instructions and find them free from reversible error.

The letter written by plaintiff in error was clearly admissible, and it was for the jury to determine from the letter and from the facts and circumstances surrounding its writing, and the conduct of plaintiff in error with respect to it after he had been charged with the commission of this crime, whether the admission of guilt contained therein referred to an admission of guilt in taking indecent liberties with Josephine. We are convinced that it is such an admission and that it has been clearly established that he is guilty of this crime.

The judgment of the criminal court is affirmed.

Judgment affirmed.

(No. 14587.—Judgment affirmed.)

C. E. HEAPS, Plaintiff in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.*—(W. F. BETOW, Defendant in Error.)

Opinion filed June 21, 1922.

1. WORKMEN'S COMPENSATION—*when evidence is sufficient to sustain award for total loss of sight.* Where an employee who has lost the sight of one eye suffers an injury to the other which causes him to be entirely blind except when he uses artificial means to keep the eye-lid open, and the evidence shows that with his eye open his sight is so imperfect that he cannot follow his employment and that the condition is morally certain to grow worse, an award for total loss of sight is justified.

2. SAME—*meaning of "permanent loss" of use of member, as used in Compensation act.* "Permanent loss" of the use of a member, as the term is used in the Compensation act, means the taking away of the normal use of the member; and the ability to do some work by aid of a mechanical device is not inconsistent with complete loss of the use of an eye or a hand.

3. SAME—*total permanent disability may include previous loss of member.* Where an employee who previous to his employment has lost an eye suffers an injury which results in the loss of the other eye he is entitled to compensation for total permanent disability.

WRIT OF ERROR to the Circuit Court of Lee county; the Hon. HARRY EDWARDS, Judge, presiding.

GALLAGHER, KOHLSAAT, RINAKER & WILKINSON, for plaintiff in error.

H. A. BROOKS, for defendant in error.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

On July 2, 1920, W. F. Betow, defendant in error, filed his claim with the Industrial Commission against C. E. Heaps, plaintiff in error, for compensation for injuries sustained while in the employ of plaintiff in error. On a hearing before the arbitrator he was awarded compensation. Upon review before the Industrial Commission additional

evidence was presented, and the commission awarded the sum of \$13 per week for 140 weeks, \$12 per week for 160 weeks and \$10 for five-sixths of a week, and thereafter a life pension of \$25 per month. On writ of *certiorari* the circuit court of Lee county confirmed the award of the Industrial Commission, and a writ of error was allowed by this court to review the judgment.

On May 15, 1920, while engaged in driving a steel scraper for plaintiff in error, a road builder, Betow's team became frightened at a tractor engine used in the work and threw him head first into the scraper and very seriously injured his face and right eye. The right eye was cut on the inner corner, next to the nose. The cut was from the inner canthus of the eye between a line drawn from the outer edge of the eye down to about half an inch below the lid. In addition to the cut the eye was considerably bruised and swollen shut and remained congested and inflamed for several days. After the injuries the muscles of the right eye-lid became paralyzed and the eye could not be opened by Betow except by artificial means. This condition is permanent, it being the judgment of physicians who testified, that the eye-lid would always remain paralyzed and the eye closed except when held open by plasters or other artificial means. The undisputed evidence offered on behalf of the defendant in error is, that before the injury he could see well with the eye and could read without glasses, but that after the accident he could only see by propping the eye-lid open and then very little, and after it was propped open objects to him took on a white cast. His sight out of that eye grew continually worse, and at the time of the trial he could not distinguish a man ten or fifteen feet away. He could not distinguish his neighbors at a distance of fifteen feet from him, and by removing the plasters which held the lid open he was totally blind. He had been blind in his left eye for about five years before the accident. After his injury he returned to his work and drove for a

while in the work he was doing when injured, by having his eye held open by plasters and by having stakes set for him to drive by, but his eye continued to have less and less sight until he was finally compelled to quit the job and take his boy out of school to drive for him.

Dr. Parker, who treated Betow immediately after his injury, testified that in addition to laceration of the eye there was considerable trauma, or, as he called it, congestion, caused by blood entering into the soft tissues, due to the blow. He stated that the eye was black above and below and the eye-ball was congested and inflamed from a direct blow to it, and that it was over a week before he could get the eye open, and after a week or more the eye was still inflamed but gradually cleared up, and that after it cleared up he discovered a cataract of the eye, but was unable to say whether it was of recent origin or of long standing.

Dr. Willard Thompson, an eye specialist, testified that the paralysis of the upper lid was caused by trauma and that there is no power to open and close the lid, and the loss of vision to Betow when his eye is propped open was attributable to cataract and not to traumatic conditions. He gave it as his judgment that the cataractous condition partially existed before the eye was hurt, but stated that the trauma would hurry or hasten a cataractous condition.

Dr. Thomas O. Edgar, another eye specialist, testified that Betow was blind in the left eye and that the upper eyelid of his right eye was paralyzed, so that it prevented his opening it; also that there was a cataract in the eye and that the eye showed results of inflammation. It was his judgment that the paralyzed condition of the lid was permanent and that he would not be able to see out of it without lifting his eye-lid, and that he only had 12/200ths of vision when the eye-lid was raised. He further testified that the cataract in the left eye is not of the same character as the cataract in the injured eye. He gave it as his

judgment that the cataract in the injured eye is the result of trauma, because it is in little streaks in the front of the lens, and that it might get worse but that he would not expect it to improve. He further stated that the cataract in the left eye appears to be a cataract of the ordinary type, but that it might have been due to an injury. Assuming that the cataract in the left eye was produced by an injury he gave it as his opinion that an operation would not relieve it, but that if it was of the ordinary type an operation might give increased vision.

Defendant in error testified that his left eye was injured or put out by a cinder striking the eye-ball while he was firing a boiler, and that he had been blind in that eye for five years.

The evidence shows conclusively that defendant in error by the injury to his right eye was reduced to total blindness except when his eye was propped open or kept open by plasters or other artificial means. It further shows that he is practically blind and unable to see to do his work when his eye is kept open, and that keeping it open is very injurious to it because not protected from dust and other flying particles by tears and other natural processes. There is no hope of improvement, and very little, if any, of his ever again seeing out of the left eye, even if operated on for cataract, and there is every prospect that his right eye will continue to grow worse and give him less vision.

It is not questioned by plaintiff in error that defendant in error is entitled to compensation for his injury. One of the real contentions of plaintiff in error is that Betow has not sustained complete loss of use or vision of his eye, and that it was error to award compensation for total disability. All the facts necessary to the recovery of compensation in this case were stipulated, except the facts as to the injury. We think that the evidence sustains the claim of defendant in error that he has sustained the loss of both eyes or the permanent and complete loss of use thereof,

within the meaning of the Compensation act. It is not necessary, to sustain the award in this case, to show total and complete loss of sight under all circumstances. He is entirely blind at all times, as already stated, except when he uses artificial means to keep his eye open. When this is done he only has 12/200ths vision, which amounts practically to blindness, and that condition is morally certain to grow worse. When he returned to work he could for a time follow the stakes and drive his team in doing his work of road building, but his eye finally got so bad that he could not see to drive properly and was discharged for that reason.

"Permanent loss," as used in the Compensation act concerning the loss of an eye, limb, etc., means the taking away of the normal use of the member. The loss of a member is complete when the normal use of the member has been taken away. Ability to do some work by aid of a mechanical device is not inconsistent with complete loss of the use of an eye or a hand. (*Mark Manf. Co. v. Industrial Com.* 286 Ill. 620; *Juergens Bros. Co. v. Industrial Com.* 290 id. 420.) It is now a well established rule in this State and other States, that where an employee who previous to his employment has lost an eye loses the other eye as the result of an injury, or who has lost an arm and loses a leg as the result of an injury arising out of and in the course of his employment, he is entitled to compensation for total permanent disability. (*Wabash Railway Co. v. Industrial Com.* 286 Ill. 194; *In re Branconnier*, 223 Mass. 273; *Brooks v. Peerless Oil Co.* 146 La. 383.) The reason for this rule is, that by the destruction of the one remaining eye the employee loses all the capacity to see that he had, and an injury causing such a loss of the remaining eye necessarily causes total disability to see.

As to the contention of the plaintiff in error that the loss of Betow's right eye was not the result of the injury, but was the result, in whole or in part, of a cataract which

was growing in his eye at the time of the injury, our finding is against that contention, as already stated. We think that the Industrial Commission was warranted in finding that blindness was the result of the injury and not of any cataract growing at the time of the injury.

The judgment of the circuit court is therefore affirmed.

Judgment affirmed.

(Nos. 14669-70-71-72-73-74.—Reversed and remanded.)

W. H. McKEOWN *et al.* Appellants, *vs.* THEO. C. MOORE,
County Superintendent of Schools, *et al.* Appellees.

Opinion filed June 21, 1922.

1. CERTIORARI—*jurisdiction of an inferior tribunal must appear from record.* It is the office of the common law writ of *certiorari* to cause the record of an inferior tribunal to be brought before the court for its determination, from an inspection of the record, alone, whether such tribunal had jurisdiction or had exceeded its jurisdiction or has failed to proceed according to the essential requirements of the law.

2. SAME—*what proceedings may be reviewed by certiorari.* Proceedings which may be reviewed by the common law writ of *certiorari* must be judicial and not ministerial or legislative, but it is sufficient if the proceedings are *quasi* judicial, as where a body of officers are invested by the legislature with power to decide upon the property rights of others.

3. SCHOOLS—*ex-officio board, acting under section 90 of School law, was required to keep record.* Under the invalid amendment of section 90 of the School law it was the duty of the *ex-officio* board created by said act to keep a record of its official acts even though the statute did not expressly require the board to keep a record.

4. SAME—*what finding of the ex-officio board is not sufficient under validating act.* The *ex-officio* board created by the invalid amendment of section 90 of the School law had no jurisdiction to act under the invalid law, and a finding by said board, on a petition to change the boundaries of a high school district, that the petition was signed by a majority of the legal voters is not sufficient to satisfy the requirement of the validating act of June 24, 1921, nor is the petition itself evidence of the fact.

5. SAME—the common law writ of *certiorari* is proper to review action of the *ex-officio* board. The common law writ of *certiorari* is proper to review the action of the *ex-officio* board changing the boundaries of a high school district under the invalid amendment of section 90 of the School law, the provision for an appeal to the Superintendent of Public Instruction having been held unconstitutional.

APPEALS from the Circuit Court of Pike county; the Hon. HARRY HIGBEE, Judge, presiding.

CAPPS & WEAVER, and STEVENS & HERNDON, for appellants.

WILLIAMS & WILLIAMS, for appellees.

Mr. JUSTICE DUNN delivered the opinion of the court:

In 1917 the General Assembly amended section 90 of the School law by enacting another section bearing the same number which omitted all reference to the subject matter of the original section 90 and covered an entirely different subject. (Laws of 1917, p. 739.) The amended law created an *ex-officio* board, composed of the county superintendent of schools, the county judge and the county clerk, with discretionary power, upon petition of legal voters, to change the boundaries of high school districts by detaching or annexing territory and to create community high school districts. This amendment was held unconstitutional in the case of *Jackson v. Blair*, 298 Ill. 605, at the June term, 1921. Before that decision, in February, 1920, a petition was filed with the *ex-officio* board of Pike county requesting that the territory known as school district No. 70 in Fairmount and Perry townships, Pike county, Illinois, be detached from Community High School District No. 171 and added to the non-high-school territory in Pike county, and the *ex-officio* board on June 16, 1920, granted the prayer of the petition. On July 14, 1921, the members of the board of education of Community High School District No. 171, together with two other residents and legal vot-

ers of that district, filed in the circuit court of Pike county a petition for a writ of *certiorari* directed to the members of the *ex-officio* board, requiring them to certify to the court the petition for the detachment of the territory from the district and all proceedings and orders upon such petition, and all records, papers, plats, documents and files pertaining to such proceedings, and their final decision and action. The writ was ordered to issue, and the respondents made a return certifying a copy of the petition for the detachment of the territory from Community High School District No. 171, together with all records, papers, plats, documents, files and orders pertaining to said proceedings. Upon such return the petitioners for the writ moved the court to quash the record of the *ex-officio* board, and the respondents entered their motion to quash the writ. The court denied the motion to quash the record and sustained the motion to quash the writ and entered judgment against the petitioners for costs, from which they have appealed.

On the part of the appellees it is contended that *certiorari* will not lie because the statute creating the *ex-officio* board did not require the board to keep a record. The only office of the common law writ of *certiorari* is to cause the record of an inferior tribunal to be brought before the court for its determination whether the inferior tribunal had jurisdiction or had exceeded its jurisdiction or had failed to proceed according to the essential requirements of the law, where no appeal or other direct means of reviewing the proceeding is given, and the court determines from an inspection of the record alone whether the inferior tribunal had jurisdiction of the parties and the subject matter and whether it had exceeded its jurisdiction or had otherwise proceeded in violation of law. No presumption of jurisdiction is entertained but the facts upon which jurisdiction is founded must appear in the record. (*Funkhouser v. Coffin*, 301 Ill. 257.) Assuming the constitutionality of section 90 as amended, an *ex-officio* board is a public board

exercising duties similar, in some respects, to some of those performed by school trustees, highway commissioners or drainage commissioners. Their acts within the authority conferred upon them by law conclude the rights of the inhabitants and tax-payers of the territory affected by their acts. These acts are intended to establish liabilities and confer privileges and to have permanent force until changed by competent legal authority. The change as established by the *ex-officio* board must be recognized and complied with by all persons within the territory concerned. How can that change be recognized and complied with unless some record of it exists? Must the community depend for its information on its promulgation by word of mouth? If so, how is the word transmitted to be authenticated? The section under which the acts were done gives an appeal to the Superintendent of Public Instruction. How was he to know what the order was from which the appeal was taken? It was necessarily implied from the nature of the board and the nature and effect of its powers that a record should be made of its official acts. In regard to a board of trustees created by the legislature of Virginia to lay off in town lots certain lands which had been granted and to dispose of them for the use of certain beneficiaries, the Supreme Court of the United States held that the book of the body thus created for public purposes, in which were recorded its proceedings, was the best evidence of its acts and ought to be admitted wherever those acts were to be proved. (*Owings v. Speed*, 5 Wheat. 420.) A book of minutes kept by the trustees of a town, though not required to be kept by law, is evidence of the acts of the trustees. (*State v. Van-Winkle*, 25 N. J. L. 73.) So a township or district school book is the best evidence of the proceedings of the school board. (*Gearhart v. Dixon*, 1 Pa. St. 224.) Although not expressly required by statute, it was the duty of the *ex-officio* board to keep a record of its proceedings. It would introduce inextricable confusion if the acts of such a pub-

lic body creating school districts and changing their boundaries were not authenticated by a record but rested entirely in parol, subject to be proved by the testimony of witnesses.

The return of appellees consists of two parts, marked, respectively, exhibit A and exhibit B. Exhibit A is stated to be a true, correct and complete copy of the petition for the detachment of the territory, together with all records, papers, documents, files and orders pertaining to said proceedings; and exhibit B a true, correct and complete copy of all the notices, testimony, evidence, rulings, offers, decisions and exceptions upon the hearing upon said petition. The record as recited in exhibit A consists of a petition signed by thirteen persons, purporting to be two-thirds of the legal voters within school district No. 70, followed by these memoranda:

"Filed with the county superintendent of schools Jan. 14, 1920.
THEO. C. MOORE, *Superintendent*.

"Re-filed Feb. 11, 1920.

THEO. C. MOORE.

"Hearing set April 16, 1920, at county court room, Pittsfield, Illinois. Continued to May 24 at the same place. Taken under advisement until June 16, 1920, when the prayer of the petition was granted. From this decision the board of education of the Community High School District No. 171 prays an appeal to the State Superintendent of Schools, which appeal is granted.

BURR SWAN,

C. A. HELKEY,

THEO. C. MOORE,

Ex-officio Board of Pike County."

A notice is also attached of a public hearing at the county court room in Pittsfield on April 16, 1920, at nine o'clock A. M., for the hearing of objections, if any, against the granting of the petition.

Since the act under which the *ex-officio* board was acting was unconstitutional the record of its proceedings could not confer jurisdiction, and upon this return, or any other return which it might have made, the court could have made no other order than one quashing the record of its proceedings. However, after the decision in *Jackson v.*

Blair, supra, the General Assembly on June 24, 1921, passed an act to validate changes in the boundaries of township or community high school districts, (Laws of 1921, p. 828,) which was approved by the Governor, and is claimed by the appellees to have had the effect to make the order of the *ex-officio* board of June 16, 1920, legal, and the circuit court gave the act that effect. This act has been held to be constitutional. (*Milstead v. Boone*, 301 Ill. 213.) It purports to legalize the acts of the *ex-officio* board falling within its conditions, one of which is that the change must have been petitioned for where the territory was detached from a high school district and added to a non-high-school district, as in the present case, by a majority of the legal voters at a school election, residing within the territory detached from the high school district. There is nothing in the record to indicate that the petition in this case was signed by such majority. The recital in the petition itself is no evidence of the fact, and even a finding by the so-called *ex-officio* board would be no evidence, for that body not being legally constituted was without power to make any finding. The circuit court erred in not quashing the record of the *ex-officio* board.

It is further insisted by the appellees that the act of the *ex-officio* board is not of such a character as may be reviewed by *certiorari*. It is said in *Mason and Tazewell Drainage District v. Griffin*, 134 Ill. 330, that the general rule seems to be that the act to be reviewed by *certiorari* must be judicial in its nature and not ministerial or legislative. It is also said that it is not essential that the proceedings should be strictly and technically judicial in the sense in which that word is used when applied to courts of justice, but it is sufficient if they are what is sometimes called *quasi* judicial. If the body of officers acting are invested by the legislature with power to decide on the property rights of others they act judicially in making their decision whatever may be their public character, and it was

stated that it has been held that the writ lies to review the proceedings of supervisors, commissioners, city councils, etc., in opening, altering or discontinuing public streets and highways as to their legality or regularity, though not as to the question of the expediency of such improvements. So the writ has been held to lie to review the action of school trustees in uniting and dividing school districts; (*Miller v. Trustees of Schools*, 88 Ill. 26;) of highway commissioners in laying out and establishing highways; (*Hyslop v. Finch*, 99 Ill. 171;) of a county board of supervisors in removing the county treasurer from office; (*Donahue v. County of Will*, 100 Ill. 94;) of drainage commissioners in annexing land to a district; (*Mason and Tazewell Drainage District v. Griffin*, *supra*;) of a county superintendent of schools in reviewing appeals from the organization of a high school district; (*Fisher v. McIntosh*, 277 Ill. 432;) and of a Superintendent of Public Instruction on an appeal from an order of an *ex-officio* board under this very section 90 now under consideration. (*Jackson v. Blair*, *supra*.) The writ of *certiorari* was properly granted to review the action of the *ex-officio* board. Since the provision for an appeal to the Superintendent of Public Instruction was held to be unconstitutional, the petitioners for the writ had no other remedy.

Five other petitions were filed at the same time with the *ex-officio* board asking for the detachment from district No. 171 of the territory or part of the territory of other school districts. The same action was taken upon these petitions and the same returns were made to the writs of *certiorari* which were issued to review the decisions of the *ex-officio* board on those petitions. The cases were all submitted together, the questions presented are identical, and the judgments in all the cases will be reversed and the causes will be remanded to the circuit court, with directions to quash the records in all cases.

Reversed and remanded, with directions.

(No. 14578.—Judgment reversed.)

THE SPRINGFIELD DISTRICT COAL MINING COMPANY, Plaintiff in Error, vs. THE INDUSTRIAL COMMISSION *et al.*—
(ROSY ZARA, Defendant in Error.)

Opinion filed June 21, 1922.

1. WORKMEN'S COMPENSATION—*accidental injury must be the proximate cause of disability or death to authorize award.* Where the injury sustained is the proximate cause of the incapacity or death, compensation is to be allowed although there was a pre-existing disease if the disease was aggravated or accelerated by the accidental injury; but there must be a direct relation between the accident and the consequent disability or death.

2. SAME—*when evidence does not support award for death from disease.* Where an employee dies of acute lobar pneumonia, an award of compensation for the death as a result of a sprained back, which injury the employee received a few days before he contracted the pneumonia, is not justified, where the only evidence for the applicant is that of the attending physician, who testified that there was a possibility that the sprain may have been a predisposing cause to pneumonia but that in his opinion the injury had no connection whatever with the disease.

WRIT OF ERROR to the Circuit Court of Sangamon county; the Hon. E. S. SMITH, Judge, presiding.

T. W. QUINLAN, for plaintiff in error.

KERR, MACDONALD & MURPHY, for defendant in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Rosy Zara presented to the Industrial Commission a claim for compensation for the death of her husband, Vincent Zara, alleged to have resulted from an injury received in the employ of the plaintiff in error, the Springfield District Coal Mining Company. At a hearing before an arbitrator it was stipulated that both parties were subject to the provisions of the Workmen's Compensation act; that the

earnings of Zara for the year preceding his injury were \$1248, and that the only question in dispute was whether or not his injury caused his death, and if so, who were the beneficiaries and the amount of compensation they were to receive. It was proved that Zara left the applicant, his widow, and five children under sixteen years of age.

The only evidence of an accidental injury and the cause of death was the testimony of C. McMahon, a doctor who attended Vincent Zara. The doctor testified that he first saw Zara on December 18, 1920, and he was then suffering from a sprained back, in the lumbar region, which he said he had received in lifting an empty car on the track on December 17. The doctor strapped his back and did not see him again until December 22, when he was suffering with acute lobar pneumonia. During the time from December 18 to 22 the doctor did not know what Zara was doing, but on December 22 he had an initial chill, which is usual in pneumonia and which was the first indication of the disease. There was complete consolidation of the lower lobe of the lung some distance from the sprain in the back, and the doctor said that there was nothing in the history of the case or the condition of Zara that would in any way connect the injury with the pneumonia; that Zara had had asthma for several years before the accident; that his general condition was not good, but he was a sick man and had asthma and was never good in the chest. The witness said there was a possibility that the weakened condition of Zara might have predisposed him to pneumonia, but he did not, at the time he treated him nor at the time of the hearing, think that the sprained back had anything to do with his death; that the injury was not sufficient to cause the death and he might have had pneumonia if he was not injured, and in his opinion he would not have survived pneumonia in the condition he was in if there had been no injury. Zara died on December 27, and the opinion of the doctor was, both at the time when he treated him and at the time

of the hearing, that there was no connection whatever between the sprain of the back and the death.

The arbitrator made an award of \$12 per week for 333 $\frac{1}{3}$ weeks, and on a review by the Industrial Commission the award was affirmed. On a writ of *certiorari* from the circuit court of Sangamon county there was a hearing in December, 1921, after the amendment of 1921 was in force and when the court was authorized to review the evidence. (*Otis Elevator Co. v. Industrial Com.* 302 Ill. 90.) The award was confirmed by the circuit court and a writ of error was allowed by this court.

The Workmen's Compensation act secures to an employee compensation for accidental injuries suffered in the course of his employment, and in case of his death from such an injury provides for compensation to specified beneficiaries. If death is fairly chargeable to an accident suffered in the course of the employment as an efficient cause compensation may be awarded, and the previous physical condition of the employee does not affect the right. So long as the injury sustained is the proximate cause of the incapacity or death, compensation is to be allowed although there was a pre-existing disease, if the disease was aggravated or accelerated by the accidental injury; (*Big Muddy Coal Co. v. Industrial Board*, 279 Ill. 235; *Wabash Railway Co. v. Industrial Com.* 286 id. 194; *Jakub v. Industrial Com.* 288 id. 87; *Spring Valley Coal Co. v. Industrial Com.* 289 id. 315; *Rockford City Traction Co. v. Industrial Com.* 295 id. 358;) but there must be a direct relation between the accident and the consequent disability or death. (*Lawrence Ice Cream Co. v. Industrial Com.* 298 Ill. 175.) Liability cannot be based upon a choice between two views equally compatible with the evidence. (*Peterson & Co. v. Industrial Board*, 281 Ill. 326; *Ideal Fuel Co. v. Industrial Com.* 298 id. 463.) In this case there is not even a choice between two views equally compatible with the evidence, but the only evidence as to the injury and its consequences

was the testimony of the applicant's witness, who said that there was no connection between the accidental injury as a moving cause and the death. The most that the doctor was willing to say was that there was a possibility, due to the weakened condition of Zara from pre-existing disease and increased weakness from the sprain, that the sprain may have been a predisposing cause of pneumonia, but in his opinion there was no connection whatever. There was an entire failure to prove that the death of Zara was due to an accidental injury suffered in the course of his employment by the plaintiff in error.

It is apparent that no further evidence can be produced to establish a claim under the terms of the Workmen's Compensation act, and therefore the judgment is reversed.

Judgment reversed.

(No. 14499.—Appellate Court reversed; municipal court affirmed.)
THE COMMONWEALTH TITLE INSURANCE AND TRUST COMPANY, Exr. Defendant in Error, *vs.* **WILLIAM L. GREGSON**, Plaintiff in Error.

Opinion filed June 21, 1922.

1. **SALES**—*title may be transferred without delivery of possession.* The Uniform Sales act has not changed but has re-enacted the common law rule that delivery of possession is not necessary to the transfer of title to goods sold, and the completion of the bargain is all that is requisite, the question being entirely one of intention.

2. **SAME**—*what necessary to relieve vendor of responsibility for goods delivered to carrier.* To relieve a vendor of responsibility for the loss of goods delivered to a carrier for the vendee, the law requires the vendor, unless otherwise authorized by the vendee, to exercise due care and diligence to provide the vendee with a remedy against the carrier.

3. **SAME**—*when vendor must suffer loss of goods delivered to carrier.* Where the vendor promises the vendee in shipping goods to an ocean port for export to take out a through export bill of

lading, but the vendor being unable to get such a bill of lading from the railroad company nevertheless ships the goods, which are lost in transit before reaching the ocean port, the vendor can not recover the price of the goods from the vendee, as the default of the vendor authorizes the vendee to decline to treat the delivery to the carrier as a delivery to himself.

WRIT OF ERROR to the First Branch Appellate Court for the First District;—heard in that court on appeal from the Municipal Court of Chicago; the Hon. CHARLES A. WIL-
LIAMS, Judge, presiding.

MCARDLE & MCARDLE, for plaintiff in error.

URION, EARLY & URION, and FYFFE & CLARKE, for de-
fendant in error.

Mr. JUSTICE DUNN delivered the opinion of the court:

The Commonwealth Title Insurance and Trust Com-
pany, executor of the will of George J. Roesch, deceased,
brought a suit against William L. Gregson in the municipal
court of Chicago and appealed from a judgment in favor
of the defendant to the Appellate Court, which reversed
the judgment and rendered judgment in favor of the plain-
tiff for \$2210.32, the amount of its claim with interest, and
for costs. Upon the petition of the defendant a writ of
certiorari was awarded to bring up the record for review.

The plaintiff in error was a provision broker in Chicago
and F. C. Reed was a broker in Philadelphia, where George
J. Roesch was doing business under the name of Roesch
Packing Company. On May 26, 1916, Gregson sent out a
circular inviting offers of certain quantities of provisions
for which he had inquiries, among others 100 barrels of
plate-beef. On May 29, Reed, referring to the circular,
telegraphed an offer of 117 barrels of family plate-beef at
\$17, and asked bids for seven barrels of family back-pork.
On May 31 Gregson telegraphed Reed an order to book

100 barrels family beef at \$17, and the same day wrote him a letter inclosing a confirmation, as follows:

"We hereby confirm our purchase made through you from the Roesch Packing Co., Philadelphia, Pa.

"Quantity—100 barrels.

"Articles—Family plate-beef (26-28 pieces).

"Specification—Strictly new cure, strictly choice quality, new cooperage, heavily salted, proper saltage allowance, packed suitable for export, for arrival at New York not later than June 19. This shipment to be accompanied by government certificates and declaration.

"Route—Included with shipping instructions.

"Shipping instructions—From W. L. Gregson & Co., later.

"Collection—W. L. Gregson & Co., 607 Insurance Exchange Bldg., Chicago, Ill. All papers to be sent to this office.

"Price—\$17 per barrel Philadelphia.

"Brokerage— $\frac{1}{2}\%$."

Thereupon Roesch got the 100 barrels ready for shipment, had it inspected, re-packed it, coopered it, put heavy caps on the barrels, had it marked, got a certificate for it and held it ready waiting for shipping instructions. On June 6 Gregson wrote Reed that Rumsey & Co., for whom the beef was bought, requested him to ask Roesch if he would take out a through export bill of lading for them for the 100 barrels of beef, pre-pay freight through and include their invoice, stating that it was necessary to ship open to Scandinavian ports; that the buyer had engaged ocean room and would furnish the contract; that the shipment should go via New York, care Norwegian-American Line, steamer Bergensfjord, June 24, to Christiania. Gregson requested an answer "whether or not Roesch Packing Company can do this, and if not, will have to make arrangements here." Rumsey & Co. also requested information as to what road Roesch intended to ship to New York. On June 9 Reed wrote to Gregson that Roesch would take out the through bill of lading but must draw on some person for the beef and freight. On the same day Gregson telegraphed Reed asking if Roesch would take out the through bill of lading, and the next day, on June 10, Reed tele-

graphed, "Roesch will take out through bill of lading shipping Reading road." On June 10 Gregson wrote to Reed a letter asking him to follow out the instructions of Rumsey & Co., which were attached, in taking out the through export bill of lading, shipping it open and pre-paying the freight, and directing him to draw on Gregson with all papers attached, noting that Roesch would ship by the Reading road. The instructions stated that the shipment must be in New York by Monday morning, June 19, and requested shipment about June 15, and that the seller ask the railroad to have their copies of the bill of lading in New York by that time. The letter repeated the directions to follow instructions fully in taking out the through bill of lading, shipping it open and pre-paying through freight. A letter was enclosed to the freight agent of the Pennsylvania Company for storage, with the request if the seller did not ship by the Pennsylvania Company to ship by any good line and change the letter to the railroad by which he did ship. The ocean contract was enclosed with the letter. The beef was directed to be consigned to the Government Food Commission, Christiania, Norway, but directions were given by a later letter to change the consignee to the Christiania Food Commission. In accordance with these instructions, Roesch on June 15 offered the beef for shipment to the Pennsylvania Railroad Company, which refused to receive it except for transportation to New York or to issue an export bill of lading, upon the ground that through shipment to the foreign port could not then be made. Roesch then shipped the goods by the Pennsylvania railroad upon a domestic bill of lading to New York, consigned to the Christiania Food Commission, Christiania, Norway, in care of the Norwegian-American Steamship Company, steamer Bergensfjord, in which Gregson had an ocean contract for space for the beef, and pre-paid the freight, \$36.63. The railroad company agreed that the shipment should be delivered to the Norwegian-American Line at New York not

later than June 19, and in time to connect with the steamer Bergensfjord of that line, sailing June 24. Roesch wrote to the steamship company the same day and the next day talked to the agent on the telephone, telling him that the goods had been shipped by the Pennsylvania railroad, which would not issue a through bill of lading and the steamship company would have to take care of it, and the agent answered that they would. Reed telegraphed Gregson on June 15, "Shipping beef Pennsylvania railroad, Reading could not handle." The beef was never delivered to the Norwegian-American Line but was lost in transit. On June 21 Gregson telegraphed Reed that no papers had been received and inquired when the car was shipped, to which Reed replied that the delay was caused by waiting on the New York end of the Pennsylvania road for the through bill of lading; that it could not be secured in Philadelphia. On June 22 Gregson sent a telegram to Reed, "Papers not received, advise," to which Reed answered, "Car shipped June fifteen papers waiting through bill of lading Pennsylvania railroad New York." The same day Gregson wrote a letter to Reed acknowledging receipt of the telegram and saying further: "From your wire I understand that the through bill of lading had to be taken out at New York instead of Philadelphia, and, of course, if this is correct this is the reason for delay."

The defense which was relied upon was that Roesch did not take out a through export bill of lading, as directed by the shipping instructions. No claim was made that there was any failure on his part to comply with the contract in any other particular. There is no disputed question of fact in the case. The defendant introduced no evidence, the contract was in writing, consisting of the correspondence of the parties by mail and telegraph, and the only question is whether the contract required Roesch to take out a through bill of lading before Gregson was bound to pay for the beef.

At common law no delivery of possession is necessary to the transfer of title to goods sold. The completion of the bargain is all that is requisite and the question is entirely one of the intention of the parties. (*Wade v. Moffett*, 21 Ill. 110; *Rhea v. Riner*, id. 526; *Kohl v. Lindley*, 39 id. 195; *Barrow v. Window*, 71 id. 214; *Hatch v. Standard Oil Co.* 100 U. S. 124.) The Uniform Sales act has not changed but has re-enacted this rule. The sale was of unascertained goods out of a larger quantity, and there was no appropriation of goods to the contract with the assent of the buyer, under which the property would pass by virtue of section 19, rule 4, of the Uniform Sales act. Roesch made no objection to the shipping instructions, but agreed to take out a through export bill of lading, to pay the freight in advance at the request of the buyer, who stated that if Roesch could not do so the buyer would himself make the arrangement. When Roesch made the shipment he learned that he could not get a through bill of lading at Philadelphia, and therefore he shipped the goods upon a domestic bill and made arrangement for a through bill upon their arrival in New York. Because the goods did not arrive he was unable to procure the through bill and was therefore unable to comply with the shipping instructions.

In order to relieve a vendor from responsibility for the loss of goods delivered to a carrier for the vendee, the law requires the vendor, unless otherwise authorized by the vendee, to exercise due care and diligence to provide the vendee with a remedy against the carrier. (*Stafford & Bro. v. Walter & Skelton*, 67 Ill. 83; *Miller v. Harvey*, 221 N. Y. 54.) This rule of the common law has also been declared by the Uniform Sales act, section 46 of which provides: "(2) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost

or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages." Roesch was "otherwise authorized by the buyer." The shipping instructions, which by his acceptance of them and agreement to carry them out had become a part of his contract, required him to procure a through bill of lading. The contract which he made with the railroad company would have been reasonable if his contract with the buyer had not required him to make a different contract, but the buyer having required the delivery to the carrier to be under a specified contract, the seller could not make a delivery which would relieve him from responsibility unless he made such contract. Whether he was bound to accept the shipping instructions or not, he did accept them and agreed to carry them out. Having failed to do so and the goods having been lost he was not relieved from responsibility, but the buyer was authorized to decline to treat the delivery to the carrier as a delivery to himself.

It is argued that Gregson ratified Roesch's act in shipping on a domestic bill of lading by his letter of June 22, in which he stated that he understood that "the through bill of lading had to be taken out at New York instead of Philadelphia, and, of course, if this is correct this is the reason for delay." This letter does not waive the requirement of a through bill of lading but does waive the delay occasioned by the inability to get it at Philadelphia and the necessity of waiting for the arrival of the beef in New York. Gregson had no reason to suppose, at the time he wrote the letter, that the through bill of lading would not be issued in New York. The steamship was not to sail until the 24th, and on that day Gregson telegraphed to Reed inquiring whether the through bill of lading had been issued and exchanged for the local. On June 25 he received a telegram from Reed saying, "Beef arrived on time, Roesch mailing local bill of lading." Gregson was not bound to

treat the delivery of the beef to the Pennsylvania Railroad Company as a delivery to him, and the property not having passed to him he was not bound to pay for it.

The judgment of the Appellate Court will be reversed and that of the municipal court affirmed.

Judgment of Appellate Court reversed.

Judgment of municipal court affirmed.

(No. 14475.—Decision affirmed.)

THE ROODHOUSE WATER CORPORATION, Appellant, vs. THE BOARD OF REVIEW OF SCOTT COUNTY, Appellee.

Opinion filed June 21, 1922.

1. TAXES—*what property is exempt as "public grounds" within meaning of section 2 of Revenue act.* The general description "other public grounds," in the ninth paragraph of section 2 of the Revenue act, enumerating property which is exempt from taxation, means property which in some sense belongs to the public and is of the same class as the public grounds specifically mentioned in the first part of the paragraph.

2. SAME—*when property used to convey water to municipality is not exempt from taxation.* For property to be exempt from taxation because it is used to convey water to a municipality, under the ninth paragraph of section 2 of the Revenue act, it must belong exclusively to the municipality and must be used exclusively for conveying water to such municipality, and property of a private water corporation is not exempt if the city merely has a right to acquire it when its payment for water shall be sufficient to return the investment of the stockholders who own it.

APPEAL from order of the board of review of Scott county.

A. B. JOHNSON, for appellant.

L. A. MEHRHOFF, State's Attorney, and J. M. RIGGS, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The Roodhouse Water Corporation owns thirty acres of land in Scott county on which there is a waterworks plant, with machinery and fixtures connected therewith, used for conveying water to the city of Roodhouse, in Greene county, where the water is purchased by the city. The corporation objected to the board of review of Scott county to the assessment of its property in that county for the purpose of taxation, claiming it to be exempt. The board of review denied the claim and held the property subject to assessment. The corporation appealed, and the case has been certified to this court by the Tax Commission.

Section 2 of the act for the assessment of property and for the levy and collection of taxes enumerates, in different paragraphs, classes of property which are exempt from taxation. The claim of appellant is that its property is exempt under the ninth paragraph, under the description, "all market houses, public squares or other public grounds used exclusively for public purposes," and the other property under the description, "all works, machinery and fixtures belonging exclusively to any town, village or city, used exclusively for conveying water to such town, village or city."

The facts upon which the decision depends are as follows: The Roodhouse Water Corporation was organized under the laws of this State to erect, maintain and operate a waterworks plant for the purpose of supplying water to the city of Roodhouse, where the principal place of business is located. The authorized capital stock is \$100,000 and the total number of shares 1000, consisting of ten shares of non-par value common stock and the remainder preferred stock entitled to a dividend, in the nature of interest, of six per cent per annum, payable semi-annually. The corporation entered into a contract with the city of Roodhouse, evidenced by an ordinance on the part of the city,

which recited that the corporation had acquired real estate at a price of \$10,000, upon which springs of water were located. The agreement was that the corporation should erect a suitable pumping station on its land, with the necessary pumps and equipment, and lay a pipe from the same to connect with existing water mains at the city and deliver to the city a sufficient supply of pure water for the use of the city and its inhabitants, for which the city was to pay at the rate of fifteen cents per thousand gallons. The capital stock was to be used only for the specified purposes, and dividends on the common and preferred stock were to be paid semi-annually. The corporation was to keep proper books of account and the contract to remain in force until the income was sufficient to pay all expenses and retire the entire capital stock, when the city was to have the property. That arrangement was not to extend beyond thirty years, and at the expiration of that time the city was to have the privilege of purchasing the plant at a price equaling the amount of the capital stock then outstanding, plus interest at six per cent from the date of the last dividend, and less any amount in the treasury applicable to the payment of dividends. All the capital stock was subscribed and paid for by individuals at the rate of \$100 per share, and the water corporation erected, equipped and operated the proposed system. The title to the property is in the water corporation, with the exclusive right of possession and control and an obligation to furnish water to the city at fifteen cents per thousand gallons, and the city is to have a right to the property when the payments by the city for water are sufficient to re-pay the capital invested, with six per cent under the form of dividends, and at the expiration of thirty years the city may purchase the property for the amount of outstanding capital stock, with interest from the last dividend.

The water corporation applied to the Public Utilities Commission for a certificate of convenience and necessity,

and represented that the city of Roodhouse was located in Greene county and had a water supply system but the water was unfit for domestic use; that a supply of pure water could be obtained from springs about seven miles from the city; that the city was financially unable to construct the plant and the corporation had been organized for that purpose, and that the city was to be the only consumer of water, which was to be delivered by the city through the distribution system then owned and operated by it. The Public Utilities Commission granted a certificate of convenience and necessity.

The general description "other public grounds" means property which in some sense belongs to the public and of the same class as the public grounds specifically mentioned, which are market houses and public squares. The land of the Roodhouse Water Corporation is not public ground in any sense, but is owned, in fact and law, by the corporation. Water when received by the city of Roodhouse is to be paid for to the corporation and is then to be used for public purposes, but that does not make the land of the corporation public grounds. The other property does not come within the description of machinery and fixtures belonging exclusively to any town, village or city used exclusively for conveying water to such town, village or city. To bring property within that description two conditions must concur: the property must belong exclusively to the municipality and must be used exclusively for conveying water to such municipality. The property is to be used exclusively for conveying water to the city of Roodhouse, but it does not in any sense belong exclusively to the city. It has no right or title to the property but only a right to acquire it when its payment for water shall be sufficient to return the investment of the stockholders, with interest.

The decision of the board of review is affirmed.

Decision affirmed.

(No. 14553.—Reversed and remanded.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. THOMAS M. MOONEY, Plaintiff in Error.

Opinion filed June 21, 1922.

1. CRIMINAL LAW—*indictment for embezzlement need not conclude with charge of larceny.* Although section 75 of the Criminal Code provides that when a person shall be found guilty of the acts therein described as embezzlement he shall be deemed guilty of larceny, the statute does not require that the indictment conclude with the statement or charge that the defendant is guilty of larceny.

2. SAME—*what is gist of crime of embezzlement—indictment.* The gist of the crime of embezzlement consists in the conversion to his own use of funds of another which the defendant has in his possession by reason of a fiduciary relation between the owner and the defendant, and when this relation is stated under the charge of conversion so that it may be readily understood the indictment is sufficient and will support a general verdict of guilty.

3. SAME—*new trial will be allowed where one juror was a member of grand jury returning indictment—waiver.* Where a juror during his examination states that he has not heard of the case aside from newspaper articles and that he has formed no opinion, but the defendant discovers, after the verdict, that said juror was clerk of the grand jury which returned the indictment and as clerk took minutes during the hearing of the charge against the defendant, a new trial should be awarded, as the defendant's failure to challenge the juror under such circumstances is not a waiver of the objection to the juror's competency.

4. SAME—*State must prove all essential elements of the crime beyond a reasonable doubt—instruction.* While it is not necessary to prove beyond a reasonable doubt every link in the chain of circumstances surrounding the commission of the crime charged, the State must prove, beyond a reasonable doubt, all the essential elements of the crime or the facts necessary to constitute the crime; and it is error to instruct the jury that it is not necessary "for the People to establish each fact necessary to show guilt beyond a reasonable doubt."

WRIT OF ERROR to the Circuit Court of Lawrence county; the Hon. JULIUS C. KERN, Judge, presiding.

PHILIP W. BARNES, B. O. SUMNER, and ELBERT B. VANDERVORT, for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, OTTO W. LONGNECKER, State's Attorney, JAMES B. SEARCY, GEE & GEE, and SHAW & HUFFMAN, for the People.

Mr. JUSTICE STONE delivered the opinion of the court :

Plaintiff in error was indicted in the circuit court of Lawrence county on the charge of embezzlement of the funds of the Bridgeport State Bank. A bill of particulars was filed in the case setting out eighteen certain promissory notes alleged to have been placed by Mooney, who was cashier of the Bridgeport State Bank, among the assets of the bank, and the face value of said notes, amounting to \$2937.41, was by Mooney taken from the funds of the bank and converted to his own use. He was convicted and brings the cause here for review.

The grounds upon which plaintiff in error seeks reversal here are, that the Lawrence county circuit court should have quashed the indictment on motion; that there was a variance between the charge and the proof as to the ownership of the property alleged to be taken; that it was error for the court to refuse to grant a new trial upon the discovery, after the return of the verdict, that one of the jurors who heard the case was a member of the grand jury which returned the indictment; and that the court erred as to instructions and admission of evidence. .

The basis of the contention that the motion to quash the indictment should have been sustained is, that while the indictment was brought under section 75 of the Criminal Code, relating to embezzlement, it should have concluded with the charge of larceny, which it did not do. The indictment charges that the plaintiff in error, as cashier of the Bridgeport State Bank, feloniously embezzled and converted to his own use, with the intent to do so, a sum of money amounting to \$2937.41. This was in substantial compliance with the statute. By section 75 of the Criminal Code, when a person shall be found guilty of the acts there-

in described as embezzlement he shall be deemed guilty of larceny. This does not require that the language of the indictment include the statement or charge that the defendant is guilty of larceny. The gist of the crime of embezzlement consists in the conversion to his own use of the funds of another which the defendant has in his possession by reason of a fiduciary relation existing between the defendant and the owner of the property. When this relation is stated under the charge of conversion so that it may be readily understood that is all that is required, and a general verdict of guilty is sufficient if the evidence warrants it. (*Lycan v. People*, 107 Ill. 423.) The crime of embezzlement is complete when there is fraudulent conversion by the accused of money or property of his employer without his consent. The distinguishing element in embezzlement is that the property is lawfully in the possession of the accused by some fiduciary relation between the accused and the owner. (*People v. Ehle*, 273 Ill. 424.) The indictment in this case sufficiently charges the crime of embezzlement.

As to plaintiff in error's contention that there is a variance in the record between the charge of ownership in the indictment and the proof relating to that matter, the record shows that the plaintiff in error testified that he placed a number of notes, among which were the eighteen notes in question, in the assets of the Bridgeport State Bank, which were from time to time approved, along with other assets of the bank, at the different meetings of the directors. The members of the finance committee and board of directors of the Bridgeport Bank denied that any authority was given or any conversation had tending to lend assent to any such transaction by plaintiff in error. It was a question of fact for the jury whether the ownership of the property was proved as alleged. If the jury believed that the notes were taken over by the bank from the receiver with the consent of the officers of the bank then the receiver would be the one entitled to the money, and if, on the other hand, they

believed that no such arrangement was made but that the taking of the money from the funds of the Bridgeport Bank was unauthorized, then the funds would be the funds of the bank. There was evidence in the record on behalf of the People that tended to show that the money charged to have been embezzled was the property of the bank. We cannot, therefore, say here, where the question is one of law and fact, that there was a variance between the allegations and the proof.

Concerning plaintiff in error's third contention, that an incompetent juror sat in the case, the record shows that one of the jurors, Porter Lofton, was a member and the clerk of the grand jury which returned ten indictments against plaintiff in error, including the one in question here. On motion for new trial, affidavits of plaintiff in error and others were filed to show that Lofton, whose name appears to the verdict as foreman of the jury, was a member of the grand jury which returned this indictment and other indictments against the plaintiff in error. These affidavits show that when Lofton was examined on *voir dire* a thorough examination was given him concerning any knowledge or opinion he may have had about the case; that he stated that he did not know anything about the case except what he had heard and some newspaper accounts he probably had read; that he did not remember anything about them and had no opinion as to the guilt or innocence of the defendant. It appears that not until after the verdict had been returned did it come to the knowledge of plaintiff in error or his counsel that Lofton was a member of the grand jury returning the indictment. The record also shows that Lofton was clerk of the grand jury returning the indictment in this case; that the investigation of the case against the plaintiff in error occupied about two days' time in which evidence was offered; that Lofton was present as clerk of the grand jury at that time; that he took down minutes of the evidence and was present all the time the matter

was under consideration. Counsel for plaintiff in error contend that they were deceived by the answers of this juror; that both the State's attorney and one of the special counsel employed by the People in the case had been before the grand jury and were in a position to know who constituted it. Technical disqualifications of jurors are not to be presumed to have injured the party against whom a verdict was returned in the absence of a showing of such injury, for the reason that such disqualifications do not tend to impeach the fairness or impartiality of the juror. The purpose of the law relating to the right to challenge a juror who has an opinion concerning the guilt or innocence of the accused is that he may secure a trial before a jury unprejudiced concerning the charge against him. He has a right to presume that jurors called to try him are competent, and where diligence is used in the examination of the jury it is not necessary that he anticipate possible objections unless he has notice of them or reason to suppose they exist. (*Rice v. State*, 16 Ind. 298.) While this question appears not to have been raised in this form in this State, similar questions have been considered in courts of other jurisdictions. In the case of *Bennett v. State*, 24 Wis. 57, it was held that a grand juror who has on his oath accused a person of guilt cannot be considered an impartial or a proper juror to try him. At common law a grand juror was subject to a fine if he did not make known, if called as a juror to try the case, that he had acted as a member of the grand jury returning an indictment against the accused. (2 Hale's Pleas, 309.) In the instant case the State contends, and Lofton so states in his affidavit, that he had forgotten that he was on the grand jury and that he had no recollection whatever about the case; that his mind was free from opinion. In *United States v. Christensen*, 7 Utah, 26, the court said concerning the incompetency of a juror who had acted as a member of the grand jury: "He may have forgotten that he was on the grand jury that found

the indictment. He may have been against finding the indictment or may have been absent when it was found, * * * but the presumptions of law are to the contrary, and in the absence of any showing to that effect he must be presumed to have participated in the finding of the indictment and to have formed an opinion as to the guilt or innocence of the defendant." While a juror who has acted as a grand juror may truthfully answer on his examination that he knows nothing about the case except what he may have read or heard and that he has no opinion concerning it, yet it seems inconceivable that such a juror could go through the entire trial of the case without having it recalled to his mind, as Lofton states in his affidavit he did. It is the fact that a juror's mind will be refreshed by hearing evidence which he has once heard that the law guards against in the endeavor to secure a trial at the hands of a fair and impartial jury. There is no showing that Lofton is a man of defective memory. The fact that he was the clerk of the grand jury and foreman of the jury returning the verdict in this case shows him to have been at least a man of average intelligence. It is evident from the record that neither plaintiff in error nor his counsel had any knowledge of the fact that this man sat on the grand jury until after the trial of the cause and the return of the verdict, and it would defeat the very purpose of the constitutional provision affording every man accused of crime a trial by a fair and impartial jury to say that under the facts here plaintiff in error has waived the right to challenge this juror by not making such challenge on the trial. In this case the trial was had before a jury, one of whom under his solemn oath returned an indictment against plaintiff in error, and in a county where the population is not large, and where public interest in charges of defalcation is naturally more or less general by reason of the infrequency of such charges, it seems beyond comprehension that a juror in the situation described here would not have recalled during the

trial that he sat on the grand jury returning the indictment. To sustain a verdict of this kind would be to violate the right of trial by an impartial jury. The circuit court should have granted a new trial for this reason, and its refusal to do so was reversible error.

Counsel for the plaintiff in error assign numerous errors as to giving and refusing instructions. It is earnestly contended that instruction No. 19 given on behalf of the People is erroneous. That instruction is as follows:

"You are instructed as a matter of law, that it is not necessary to warrant a conviction in this case, for the People to establish each fact necessary to show guilt beyond a reasonable doubt. The reasonable doubt must relate to the guilt of the accused on the whole evidence."

This was error. It is a fundamental requirement that the accused be proven guilty of the crime charged in the indictment beyond a reasonable doubt. It is difficult to conceive of this being done without the jury being satisfied on the proof of all the facts necessary to constitute the crime beyond a reasonable doubt. While it has been said that it is not necessary to prove beyond a reasonable doubt every link in the chain of circumstances surrounding the commission of the crime charged, it has never been held to be the rule that the State need not prove the essential elements of the crime or the facts necessary to constitute the crime beyond a reasonable doubt. If one fact necessary to constitute the crime is not proven as required by law, then the crime itself is not proven as the law requires. This instruction was prejudicial error.

Other errors occurred on the trial but they are such as are not likely to occur on a re-trial and require no further attention.

For the reasons here given the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

(No. 14563.—Judgment affirmed.)

THE ST. LOUIS PRESSED STEEL COMPANY, Plaintiff in Error,
vs. ADOLPHUS SCHORR, Defendant in Error.

Opinion filed June 21, 1922.

1. WORKMEN'S COMPENSATION—*award cannot be reviewed upon application for judgment.* The method of review provided by section 19 of the Compensation act is exclusive, and on application to the circuit court for judgment on an award the court has no jurisdiction to review the award, to construe the statute or to determine whether or not the decision of the board is correct.

2. SAME—*filing of petition for review must be proved by certified copy.* On application for judgment on an award by an arbitrator the filing of a petition for review with the Industrial Commission cannot be shown by the certificate of the secretary of the commission that the petition was filed but such proof can be made only by the officer's certificate to a copy of the petition.

3. EVIDENCE—*when certificate of officer is not evidence of record.* If an officer is bound to record a fact the proper proof of the record is a copy duly authenticated, but as to matters which the officer is not bound to record, his certificate, being extra-official, is merely the statement of a private person and will be rejected.

WRIT OF ERROR to the Circuit Court of St. Clair county;
the Hon. GEORGE A. CROW, Judge, presiding.

WILLIAM E. WHEELER, (M. F. OEHMKE, of counsel,) for plaintiff in error.

W. E. HADLEY, and F. H. KRUGER, for defendant in error.

Mr. JUSTICE DUNN delivered the opinion of the court:

On petition of the St. Louis Pressed Steel Company a writ of error was awarded to review the record of the circuit court of St. Clair county, which rendered a judgment against the plaintiff in error in favor of Adolphus Schorr upon an award by an arbitrator of the Industrial Commission for \$10 a week on account of temporary total disability for 12 weeks and for \$10 a week for 180 weeks on

account of permanent loss of ninety per cent of the use of his right hand. The application for judgment alleged that no proceedings for review of the award had been taken and that the plaintiff in error refused to pay compensation according to the award. The respondent filed an answer, alleging that it had filed its petition for review within fifteen days of the receipt of notice of the award; that the arbitrator, to correct an error in the award, made a second award, and the plaintiff in error, within fifteen days of receipt of notice of the second award, filed its petition for review of the second award, and that the petitions for review were pending and undetermined before the Industrial Commission. On the hearing the plaintiff in error offered in evidence a letter from the secretary of the commission stating that the award was made on April 5, 1921, but that it was erroneous on its face; that the arbitrator made a second award, which was also erroneous; that the plaintiff in error filed petitions to have both awards reviewed, which are pending before the commission, but that the commission's entire file in the case had been missing for a long time; that diligent search had failed to bring it to light, and that therefore it was impossible to furnish certified copies of the petition for review. The plaintiff in error also offered in evidence a certificate of the secretary to the same facts, which also contained copies of the awards.

Nothing more appears in the record as to the nature of the defendant's injury than the statement in the award that it caused a permanent partial loss of ninety per cent of the use of his right hand. The compensation provided by the Workmen's Compensation act for the loss of a hand or the permanent and complete loss of its use is fifty per cent of the average weekly wage during 150 weeks, ninety per cent of which would be 135 weeks instead of 180. The plaintiff in error insists that on the face of the award the amount could not exceed \$10 a week for 135 weeks; that there is a manifest clerical error in computation and that the award

is excessive. The law provides by section 19 a method of review for the correction of errors, and also provides that if such method is not adopted the circuit court may render judgment in accordance with the award, and if the employer refuses to pay compensation according to the award, the court shall, in entering judgment thereon, tax as costs against him the reasonable costs and attorney's fees in the arbitration proceedings and in the court entering the judgment for the person in whose favor the judgment is entered. The method of review provided by section 19 is exclusive, and on application for judgment on the award the court has no jurisdiction to review the decision, construe the statute or determine whether the decision of the board was correct or not. *Fitt v. Central Illinois Public Service Co.* 273 Ill. 617; *Bernstein v. Brothman*, 275 id. 290; *Friedman Manf. Co. v. Industrial Com.* 284 id. 554.

The evidence offered by the plaintiff in error was objected to and was all incompetent. The filing of a petition for review cannot be shown by the certificate of the officer having charge of the records that the petition was filed, but only by his certificate to a copy of the petition. (*Steidl v. People*, 173 Ill. 29.) The certificate that the petitions and files had been lost was also incompetent. If an officer is bound to record a fact, the proper proof is a copy of the record duly authenticated. As to matters which he is not bound to record, his certificate, being extra-official, is merely the statement of a private person and will therefore be rejected. 1 *Greenleaf on Evidence*, sec. 498; *Schaefer v. Wunderle*, 154 Ill. 577.

The plaintiff in error contends that the circuit court had power to enter judgment only upon an award providing for payment of compensation according to the act and had no power to enter judgment in this case upon the award made. The Industrial Commission had jurisdiction of the subject matter of the compensation due the claimant and of the persons of the claimant and the employer, and since the

legality of its award is not subject to review upon an application of this character the defendant in error was entitled to judgment.

The circuit court gave judgment in favor of the defendant in error for \$150 attorney's fees as costs, and the plaintiff in error contends that this was erroneous because it has never refused to pay compensation to which the defendant in error was rightfully entitled. This argument assumes that the plaintiff in error was not bound to pay the award because it was for too large an amount, but that question is not reviewable in this proceeding.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

(No. 14539.—Judgment affirmed.)

THE WESTERN METALS COMPANY, Plaintiff in Error, *vs.*
THE HARTMAN INGOT METAL COMPANY, Defendant
in Error.

Opinion filed June 21, 1922.

1. **CONTRACTS**—*when a contract of sale composed of separate writings will satisfy the Statute of Frauds.* To take a contract of sale of merchandise out of the Statute of Frauds there need not be a formal written contract complete in one writing, but the contract may be gathered from letters, writings or telegrams between the parties if they are sufficiently connected with each other.

2. **SAME**—*effect where only one of several writings is signed.* Where only one of the several writings relied upon to establish a contract of sale is signed by the party to be charged the signed writing must refer expressly to the other writings, or the several writings must be so connected, either physically or otherwise, as to show by internal evidence that they relate to the same contract.

3. **SAME**—*what is a sufficient memorandum to satisfy Statute of Frauds.* No particular form of language is necessary to constitute the memorandum of a contract of sale requisite to satisfy the requirements of the Statute of Frauds, but any kind of writing, from a solemn deed down to mere hasty notes or memoranda from which the intention of the parties may be gathered, as in other contracts, will be sufficient.

4. *SAME*—*to satisfy Statute of Frauds an unsigned paper must be referred to in signed memorandum.* For connected writings to satisfy the Statute of Frauds in a contract of sale the paper signed by the party to be charged must refer to the unsigned paper in clear and distinct terms, and the signed paper cannot be incorporated in the unsigned paper by a reference in the latter.

5. *SAME*—*parol proof is not admissible to establish connection between writings.* Parol evidence is not admissible to show that separate writings are parts of one contract so as to satisfy the Statute of Frauds but the connection must be apparent from a comparison of the writings themselves.

6. *SAME*—*when sufficient memorandum of contract of sale is not established.* Sufficient memorandum of a contract of sale to avoid the Statute of Frauds is not established by correspondence between the parties, which, although it impliedly admits the existence of the contract, does not refer to the particular writing which states the terms of the contract and which it is necessary to consider in order to complete the memorandum.

WRIT OF ERROR to the First Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOSEPH B. DAVID, Judge, presiding.

ISAAC S. ROTHSCHILD, for plaintiff in error.

JOHN S. STEVENS, (JAMES V. O'DONNELL, of counsel,) for defendant in error.

Mr. CHIEF JUSTICE THOMPSON delivered the opinion of the court:

November 2, 1918, the president of plaintiff in error and the president of defendant in error met by chance in the office of a mutual acquaintance in Cleveland, Ohio. Plaintiff in error is a dealer in scrap metal in that city and defendant in error is a manufacturer of ingot brass in Chicago. There was some talk there regarding a sale by the former to the latter of a quantity of scrap brass. Following this conversation plaintiff in error sent to defendant in error a confirmation of a sale upon a printed blank. This confirmation reads:

"Confirmation.

THE WESTERN METALS COMPANY.

Corner Detroit & Center Streets, Cleveland, Ohio.

Sales Order No. 2053.

Date, November 2, 1918.

"Sold to Hartman Ingot Metal Company, Chicago, Ill. Terms 30 day acceptance draft for 90% of the invoice. F. o. b. Chicago. Shipment to be made any time between now & 1/31/19.

Quantity and Material.

Prices.

25 tons #1 red brass borings.....	per lb. 20c
25 " clean light brass.....	" " 13c"

Following the receipt of this confirmation the secretary to the president of defendant in error wrote this letter:

"FPL

CHICAGO, ILL., Nov. 8, 1918.

Western Metals Co., Cleveland, Ohio:

"GENTLEMEN—We will absolutely refuse to accept any shipments of metals until such a time as you are again notified by us to the contrary, owing to the fact that we are so badly congested here at the present time. Trusting you will give this matter your attention, we are

"Yours very truly,

HARTMAN INGOT METAL CO.

John Hartman."

November 11 plaintiff in error acknowledged receipt of this letter and asked defendant in error to notify it when conditions at its plant would make a shipment possible. No reply was made to this letter. December 4 plaintiff in error again wrote defendant in error, advising it that it was shipping the fifty tons of scrap covered by the contract. Immediately upon receipt of this letter defendant in error wired that it would refuse to accept the shipment. On the same day it wrote plaintiff in error that it would under no circumstances receive any materials until it had notified plaintiff in error to make shipment. December 9 plaintiff in error replied to this letter and telegram, saying that it would comply with the request for a short time but that it could not withhold shipment much beyond January 1. On receipt of this letter defendant in error replied that no shipments were to be made until specific instructions were sent to that effect. January 3, 1919, plaintiff in error wrote that it could not longer withhold shipment and that it pro-

posed to make shipment at once, and requested shipping instructions. Four days later defendant in error replied to this letter as follows: "On account of the government canceling orders on all purchases they have made we are likewise canceling all written orders we have given our trade. We might have given you a verbal order, and this would be under the same ruling as all written orders we have given others." Following receipt of this letter plaintiff in error began an action in assumpsit in the superior court of Cook county for breach of the contract of sale. To the declaration filed, defendant in error pleaded the general issue, the Statute of Frauds of Ohio and the Statute of Frauds of Illinois. A trial was had before a jury, which returned a verdict for \$4500 in favor of plaintiff in error. On appeal to the Appellate Court the judgment of the superior court entered on this verdict was reversed. The cause comes here by *certiorari*.

That an oral contract of sale was made in Cleveland is finally established by the verdict of the jury, the judgment of the superior court and the action of the Appellate Court in reversing the judgment of the superior court without remanding and without making a finding of fact different from the finding of the trial court. The Appellate Court found that the action was barred because of the provisions of section 4 of the Uniform Sales act, commonly called the Statute of Frauds. This section provides: "A contract to sell or a sale of any goods * * * of the value of \$500 or upwards shall not be enforceable by action * * * unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf." (Hurd's Stat. 1921, p. 2855.)

It is not necessary in order to take the contract of sale out of the Statute of Frauds that there be a formal written contract, nor is it necessary that the written memorandum be complete in one writing. (*Ullsperger v. Meyer*, 217 Ill. 262.) It is well established that a complete contract, bind-

ing under the Statute of Frauds, may be gathered from letters, writings and telegrams between the parties relating to the subject matter of the contract and so connected with each other that they may be fairly said to constitute one paper relating to the contract, though only one of the writings may be signed by the party to be charged. No particular form of language is necessary to constitute the memorandum requisite to satisfy the requirements of the statute. Any kind of a writing, from a solemn deed down to mere hasty notes or memoranda from which the intention of the parties may be gathered, as in other contracts, will be sufficient. (*McConnell v. Brillhart*, 17 Ill. 354; *Lasher v. Gardner*, 124 id. 441; *Flegel v. Dowling*, (Ore.) 102 Pac. 178.) It is equally well established that the signed writing or writings must refer expressly to the other writing, or the several writings must be so connected, either physically or otherwise, as to show by internal evidence that they relate to the same contract. (*Wood v. Davis*, 82 Ill. 311; *Kopp v. Reiter*, 146 id. 437; *Peck v. Vandemark*, 99 N. Y. 29, 1 N. E. 41; *White v. Breen*, 106 Ala. 159, 32 L. R. A. 127.) A paper signed by the party to be charged cannot be incorporated in a paper not signed by him by a reference in the latter. The signed paper must refer to the unsigned paper in clear and distinct terms. (27 Corpus Juris, 263.) Oral evidence is inadmissible to connect the several papers or show that they relate to the same transaction. Oral evidence can only bring together the different writings. It cannot connect them. They must show their connection by their own contents. The connection must be apparent from a comparison of the writings themselves. (25 R. C. L. 680; 2 Page on Contracts, 2285; 29 Am. & Eng. Ency. of Law,—2d ed.—850; *Cunha v. Gallery*, 29 R. I. 230, 69 Atl. 1001.) After the several writings connect themselves together into one complete memorandum, parol proof is proper to show that the several writings apply to the subject matter of the suit and not to some

other sale. This is equally so in case the complete memorandum is contained in one writing. The rule with respect to the admission of parol proof is the same whether the memorandum is to be found on one paper or on several papers which connect themselves together. The wisdom of the rule forbidding the use of oral evidence to show the connection between the several papers is at once apparent. If it is necessary to use oral evidence to show that the papers are parts of one contract of sale then the contract becomes partly oral and partly written, and we have then introduced all the mischiefs which the Statute of Frauds and Perjuries was intended to prevent. The line must be established somewhere, and that line has been wisely established at a definite point. If we break across this line and permit the use of some oral evidence to connect the writings then we introduce into the law confusion and uncertainty, because no one will then know how much oral evidence will be permitted to join the several writings in a given case. We think the established rule a wise one and will not depart from it.

Turning now to the several writings in the case at bar, what do we find to connect them? It must be apparent to anyone that the correspondence admitted the existence of a contract of sale, but that is not the question for us to decide. That question is already settled by the judgment of the Appellate Court. The only question presented to us is whether there is a memorandum of this contract of sale, complete in all its terms and signed by defendant in error. There is no contention that such a memorandum exists unless the letters signed by it are so connected with the confirmation dated November 2, 1918, as to make the confirmation and the letters a memorandum sufficient to satisfy the requirements of the statute. The correspondence will be examined in vain in an effort to find the slightest reference to the confirmation. At no time does defendant in error admit that the confirmation correctly states the terms

of the contract. In fact, defendant in error does not even admit in its correspondence the existence of the confirmation. Conceding that its letters admit the existence of the oral contract of sale, there is nothing in the letters, or in any paper to which the letters refer, that states any of the terms of the contract. It is unquestionably the law that the memorandum upon which it is sought to charge a party to a contract must state the contract with such certainty that its essentials can be known from the signed writing, or by some reference contained in the signed writing to some other writing, without recourse to parol proof to supply the essential elements of the contract or to supply the connecting links between the signed writing and some other writing or writings. It is clear that the correspondence offered in evidence in this case does not meet these requirements.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(No. 14510.—Reversed and remanded.)

PHILIP DRAY, Plaintiff in Error, vs. THE FIRST NATIONAL BANK OF ALLEGAN, Defendant in Error.

Opinion filed June 21, 1922.

1. PRACTICE—*Appellate Court on dismissing appeal for failure to file record must assess damages.* Under section 101 of the Practice act, upon the failure of an appellant to file authenticated copies of the record, as required by law, it is the duty of the Appellate Court to assess damages as provided in said section and to dismiss the appeal or affirm the judgment or decree.

2. SAME—*when decree is not for the recovery of money.* A decree is not for the recovery of money, within the meaning of section 101 of the Practice act, where it provides merely that the defendant be enjoined from disposing of certain notes which he has in his possession and finds that he has no interest in the fund which the notes represent and which is held by a trustee in bankruptcy as money derived from a composition with the creditors of the estate.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding.

ISRAEL COWEN, for plaintiff in error.

MORRIS K. LEVINSON, for defendant in error.

Mr. JUSTICE STONE delivered the opinion of the court:

A decree was entered in the superior court of Cook county ordering that Frank M. McKee, trustee in bankruptcy, pay to the defendant in error \$4800, which sum the trustee held as money derived from a composition of the creditors of the estate of which he was trustee. The chancellor further ordered, adjudged and decreed that plaintiff in error, Philip Dray, had no right, title or interest in the funds or notes which constituted the basis for the composition, and permanently enjoined him from collecting or attempting to collect the proceeds so held by the trustee and from selling, assigning or delivering any of the composition notes, and ordered him to deliver and surrender possession of the composition notes to the clerk of the superior court of Cook county within two days from the date of the entry of said decree; that the master's fees in said cause, amounting to \$269.39 for preparing his conclusions of law and fact and drawing a report to the court, and his further fees of \$69.30 for taking testimony, be taxed as costs and added to the other and regular court costs, and that execution issue for all costs taxed in favor of defendant in error and against plaintiff in error and Paul Witkowski. From this decree plaintiff in error alone prayed an appeal to the Appellate Court for the First District, which was allowed upon giving bond as required by the court. The appeal bond was filed within the time prescribed by the court and approved. Plaintiff in error, however, failed to file with the Appellate Court on the day it should have been

filed a transcript of the record of the superior court, for which reason the Appellate Court, upon short record filed by defendant in error, dismissed the appeal and assessed damages, under section 101 of the Practice act, in the sum of \$400 and costs, ordered execution thereon and directed that *procedendo* be awarded.

The only question presented by the assignment of error in this case is whether or not the decree entered by the superior court of Cook county is a decree for the recovery of money, and whether for that reason the Appellate Court was authorized to assess damages of not less than five nor more than ten per cent of the amount recovered in the trial court, under section 101 of the Practice act, for failure to file authenticated copies of the record, as required by law, or should have entered judgment for not less than \$50 nor more than \$250 damages.

The damages assessed by the Appellate Court are based upon section 101 of chapter 110 of our statutes, which is in the following language: "When appeals from judgments, orders or decrees for the recovery of money are dismissed by the Supreme or Appellate Court for want of prosecution, or for failing to file authenticated copies of records, as required by law, or are affirmed for either of such causes, the court shall enter judgment against the appellants for not less than five (5) nor more than ten (10) per cent damages on the amount recovered in the trial court or inferior court. If the judgment, order or decree appealed from is not for the recovery of money, the Appellate or Supreme Court, as the case may be, shall, in case of dismissal or affirmance, for either of the causes in this section mentioned, enter judgment for not less than fifty (50) dollars, nor more than two hundred and fifty (250) dollars damages. The appellee shall be entitled to execution thereon as on other judgments."

From the foregoing section of the Practice act it is clear that it was the duty of the Appellate Court to assess dam-

ages for the failure of plaintiff in error to file authenticated copies of the record, as required by law. It was the duty of the Appellate Court, under these circumstances, to affirm the judgment or dismiss the appeal with damages. (*Chicago Federation of Musicians v. American Musicians' Union*, 234 Ill. 504.) If the decree entered in this cause against plaintiff in error is for the recovery of money then the judgment of the Appellate Court should be affirmed. If the decree is not for the recovery of money the decree should be reversed and the cause remanded to the Appellate Court, with directions to assess damages as provided in the foregoing section. An examination of the decree discloses that it contains no provision for the recovery of money against plaintiff in error. As to him the decree provides for an injunction against any disposition or transfer of the composition notes which the decree found to be in his possession, and orders him, within two days from the date of the entry of the decree, to surrender the notes to the clerk of the superior court of Cook county. The other provisions of the decree are matters necessary to determine what shall be costs and to order the same taxed as costs of the suit. There being no money decree entered against plaintiff in error there is no basis upon which to calculate damages provided for in the first provision of the above section. The statute by this method of calculation contemplates only cases in which a judgment, order or decree appealed from is one for the recovery of money against the appellant. (*Hamburger Co. v. Glover*, 157 Ill. 521.) The decree not being a money decree, damages on dismissal of the appeal should have been assessed in accordance with the second provision of said act.

For the foregoing reasons the decree is reversed and the cause remanded to the Appellate Court for the First District, with directions to enter judgment for not less than \$50 nor more than \$250, as provided by the foregoing section.

Reversed and remanded, with directions.

(No. 14645.—Cause transferred.)

A. G. DICUS, Appellant, *vs.* DAVID FUCHS *et al.* Appellees.

Opinion filed June 21, 1922.

APPEALS AND ERRORS—*when appeal from decree in partition suit does not involve freehold.* An appeal from a decree in a partition suit does not involve a freehold where the only errors assigned are that the court erred in denying an allowance of solicitor's fees to the complainant and in subjecting his interest to the lien of a judgment against his grantor.

APPEAL from the Circuit Court of Cook county; the Hon. GEORGE FRED RUSH, Judge, presiding.

ERNEST J. BATTEN, for appellant.

CHRISTIAN C. H. ZILLMAN, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

A suit for partition of a lot in Chicago, in which the appellant, A. G. Dicus, was complainant, resulted in a decree finding that he and David Fuchs were the owners each of an undivided one-half of the lot; that the share of the complainant was subject to the lien of a judgment of the Humboldt State Bank recovered in the municipal court of Chicago against Abraham Gross, grantor of the complainant, and that the complainant was not entitled to an allowance for solicitor's fees. From that decree this appeal was allowed and perfected.

The errors assigned are that the court erred in denying an allowance of solicitor's fees to the complainant and in subjecting his interest to the lien of the judgment. There is no assignment of error which raises any question as to the decree concerning the freehold or ordering partition of the same, and this court has no jurisdiction, by direct appeal, of the findings concerning which errors are assigned.

The cause is transferred to the Appellate Court for the First District.

Cause transferred.

(No. 14518.—Reversed and remanded.)

HENRIETTA E. DOUGHERTY, Appellee, *vs.* NEIL S. DUCKELS
et al. Appellants.

Opinion filed June 21, 1922.

1. **CONTRACTS**—*relinquishment of right to contest will is a sufficient consideration for an agreement.* Where a son is dissatisfied with the provisions of his mother's will, a relinquishment of his right to contest the will is a sufficient consideration for an agreement with his sister, who was the principal devisee, that the will be set aside and that the property be disposed of as provided in the agreement, where the son in good faith was proposing to file a bill to contest the will, had employed counsel and looked up evidence for the purpose.

2. **SAME**—*compromise of disputed claim is a sufficient consideration to support an agreement.* A compromise of a disputed claim made in good faith, whereby the claim is extinguished, is a sufficient consideration to support an agreement, and the courts will not inquire into the merits of the claim to determine whether it could have been successfully maintained in a suit brought to enforce it.

3. **DEEDS**—*mere relationship of brother and sister does not establish fiduciary relation.* The mere relationship of brother and sister does not necessarily establish a fiduciary relation even though the sister gives the brother a power of attorney authorizing him to do all things necessary to settle their mother's estate, where the evidence shows that she did not rely on him to advise and protect her but handled her own interests.

4. **SAME**—*what is necessary to establish a fiduciary relation.* To establish a fiduciary relation the evidence must disclose a state of facts showing confidence reposed on one side and resulting superiority and influence on the other, so that the one in whom the confidence is reposed is in equity and good conscience bound to act in good faith with regard to the interests of the one reposing the confidence.

5. **SAME**—*effect of existence of fiduciary relation between parties to deed.* While a deed between parties where a fiduciary relation exists is not necessarily void, a court of equity will not permit the dominant party to use his position to secure an undue advantage over the other and will require him to prove that the transaction was fair, and wherever influence has been acquired and abused, confidence reposed and betrayed, relief will be granted the wronged party.

APPEAL from the Circuit Court of Macoupin county; the Hon. F. W. BURTON, Judge, presiding.

L. O. VAUGHT, (BELLATTI, BELLATTI & MORIARTY, of counsel,) for appellants.

WORTHINGTON, REEVE & GREEN, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

This appeal is prosecuted from a decree of the circuit court of Macoupin county granting the prayer of an amended bill filed by the appellee to set aside certain deeds made by her to appellant and for other relief. Neil S. Duckels (hereafter called appellant) and appellee are the only surviving children and heirs of Henrietta Duckels, who died testate April 9, 1915, leaving no surviving husband. Mrs. Duckels was a resident of Morgan county, Illinois, but for the last few years of her life she had been living most of her time in States where the climate was more agreeable to her than Illinois. She died in San Antonio, Texas. Appellant, her son, had for many years been residing in California, and her daughter, the appellee, being unmarried, lived with her mother. At the time of her death Mrs. Duckels owned 145 acres of farm land in Macoupin county, a residence property in Jacksonville, 349 acres of land in Jackson county, Texas, and some personal property which does not appear to have been of great value. By her will she charged appellant with an advancement of \$21,400 and gave him one-half of the Texas land and a bequest of \$2000. She gave appellee all her personal property, all the land in Illinois and one-half of the Texas land. The will was executed in 1909. Mrs. Duckels' body was brought to Illinois for burial and both the appellant and appellee were at the funeral. When the will was read, shortly after the funeral, appellant expressed dissatisfaction with it, refused to enter his appearance to the application for its probate and an-

nounced his intention to contest it. Before he left Jacksonville to return to his home in California he consulted and employed counsel and made investigations in St. Louis, where his mother had been treated by a specialist, and in San Antonio, and in Jackson county, Texas, for evidence to use in the contest. The will gave the coal underlying the Macoupin county land to George Ball, one of the persons named as executors, in trust for fifteen years, to sell the same and divide the proceeds equally between appellant and appellee. The will was admitted to probate May 24, 1915, and Ball qualified as sole executor. While appellant was in San Antonio he called upon appellee, who had returned there after the funeral. It appears that their relations had not been of a very friendly character for several years. The advancement charged to appellant in the will was made some years before the will was executed, by the payment of liabilities of appellant resulting from an unfortunate business venture, and which caused unfriendly feelings between appellee and appellant. Appellant claimed he had reason to believe appellee received from her mother considerable sums of money which had not been charged to her as advancements. Appellee heard by letter received from Ball before the brother's visit to her in San Antonio soon after the funeral, that appellant was going to contest the will. She asked him what he was going to do about it, and he said he was going to contest the will and that his attorney had advised him he had sufficient evidence. Appellee said she did not want a contest and would rather compromise than have a lawsuit, and appellant testified she asked him what he would do if she would agree that the will be set aside. They then agreed upon a settlement of the controversy, which they put in the form of a written agreement prepared by themselves. The agreement provided that the will be set aside and the estate be disposed of the same as if there had been no will; that appellant would pay appellee \$8000 in addition to an equal division

of the estate, to be deducted from his share at the time of final settlement of the estate. The agreement recited that the real estate should not be sold until business conditions improved, when it would be disposed of in the manner that then seemed best. The agreement was dated May 13, 1915, was signed in triplicate, each of the parties keeping a copy and appellee mailed one to Ball, the executor, with a letter in which she expressed her satisfaction with the settlement. Appellant also wrote Ball that he had heard Ball and his attorneys were not intending to recognize the settlement agreement and inquired if that was true. Ball answered that he did not intend to interfere with the settlement "provided it is fair." He later wrote appellant that he was advised not to consent to setting the will aside. In April, 1916, just before the expiration of one year from the admission of the will to probate, appellant and appellee joined in a bill filed in Morgan county to set aside the will, which suit was never tried and was finally dismissed. Appellant testified the bill was filed because of Ball's attitude toward the settlement and as a matter of precaution to avoid the bar of a contest. January 10, 1916, appellee executed quitclaim deeds to appellant for the undivided one-half of all the real estate in Illinois. Afterward she wrote appellant proposing to sell to him all her interest in the land in Illinois and Texas for \$21,000. Appellant refused to consider it and testified he advised her not to sell. She continued to write him about buying it and finally offered to take \$18,000. Early in July, 1916, appellant stopped at San Antonio on his way to Illinois and agreed to buy appellee's interest for \$18,000 provided he could arrange in Illinois to borrow the money. While appellant was then in San Antonio he and appellee united in executing a mortgage on the Illinois farm land to E. E. Crabtree to procure a loan of \$3500 to pay debts of their mother's estate. Appellee also at that time gave the appellant a power of attorney authorizing him to do all things necessary to close up their

mother's estate. July 12, 1916, appellant mortgaged the undivided one-half of the Illinois farm land to secure an indebtedness of \$4825 of his to a bank. After much correspondence an agreement was entered into between the parties August 9, 1916, which recites it is in substitution of all former agreements and a complete settlement between the parties. By it appellee agreed to convey to appellant all her right, title and interest in the Texas and Illinois land except the coal under the Illinois farm land, and also assigned to him whatever interest she had in the personal estate of their mother which had not been disposed of. Appellant agreed to pay her \$1000 cash and give her a non-negotiable note for \$15,000, bearing five per cent interest after October 1, 1916, payable in monthly installments, beginning October 1, 1917, the principal payable in installments of \$800, the first installment payable October 1, 1921, and a like installment on the first of October each year thereafter until the note was fully paid, the note to be secured by first mortgage on the half interest in the Illinois farm land conveyed by appellee to appellant. Appellee executed deeds in accordance with the agreement and appellant paid the \$1000 cash, and he and his wife executed both the note and mortgage to secure the \$15,000. July 15, 1918, appellee filed a bill in Texas to set aside the deed to appellant for her interest in the Texas land on the ground that she was of unsound mind and the conveyance was obtained by fraud. The original bill in this case was filed in Macoupin county on November 17, 1919, for foreclosure of the mortgage for default of the appellant in making payments as they became due. Appellant answered the bill and filed a cross-bill, setting up, in substance, that the suit in Texas was the cause of his default; that he defended that suit at great expense and had appealed from a decree of the district court setting aside appellee's deed to him. April 12, 1920, appellee filed her amended bill to set aside her deeds to the Illinois land, on the ground that

she was mentally and physically weak and they were procured by appellant by fraud and intimidation. Both the amended bill and the answer to it are lengthy, going into much detail, but the gist of the charge is that appellee was not of sound mind and appellant procured the deeds by fraud, all of which is denied. The cause was referred to the master in chancery. A little oral evidence was heard, but practically all the evidence of both parties was a transcript of the record of the trial of the case in the district court of Texas. The master reported that the evidence sustained the allegations of appellee's bill as to her unsoundness of mind and the fraud of appellant in procuring the deeds. He recommended a decree as prayed in the bill. The chancellor overruled exceptions of appellant to the master's report except the finding that appellee was *non compos*, and found and decreed that she was of weak mentality, acted under the influence of appellant, and was not capable, under the circumstances, of protecting her interests. The decree set aside the deeds, ordered appellant to pay the Crabtree mortgage, that appellant and his wife, within thirty days, execute deeds to appellee for the Illinois land except the coal underlying the farm land, and that appellee surrender the \$15,000 note.

There was a complete failure of proof that appellee was so mentally unsound as to be incapable of understanding the nature and effect of her acts in executing the agreements and deeds. The decree finds appellee was not *non compos* but that she was of weak mentality, had no financial judgment and was acting under the influence of appellant when she made the agreement and deeds; that appellant obtained the title through fraud, without adequate consideration, and through his fiduciary relation to appellee. We fail to find the proof to sustain the finding that appellee was of weak mentality. She was over thirty years old when the transactions between her and appellant took place and for several years before her mother's death had

transacted her business. She collected rents, interest, made loans, borrowed money and looked after the bank account, which she kept in her own name. During the last year of Mrs. Duckels' life appellee negotiated loans for her with John Leach, of Jacksonville, Illinois, aggregating \$2700. The record contains many letters written to appellant, to Ball, the executor, and others, and they are all intelligent and show she had a clear conception of the affairs of the estate and the affairs about which she wrote. The only weakness indicated by the proof is that she managed to get rid of more money than could reasonably be accounted for. Appellant wrote Ball of this after his first visit to appellee, in May, 1915; that appellee was unable to explain how she had expended all the money she had received; that she said she had less than \$100 in the bank; that she asked appellant to write to Ball to loan her \$1000 of the estate money. Appellant said he could not understand how she got rid of her money so fast unless she was the victim of leeches. He suggested that Ball pay her \$50 or \$60 per month until more was available. In a letter to Ball on May 13, 1915, appellant wrote appellee had in the year 1914, and up to April, 1915, come into possession of \$5000, which she claims to have expended in living expenses. Appellant referred to the known living expenses and said it was a small fraction of the sum received; that appellee was worried as to how she would live until the estate was settled, and he expressed the belief that "some people were preying on her" and that a conservator should be appointed for her. Appellant testified that there was no question that appellee's mental condition was sound, but his suggestion of the appointment of a conservator was on the ground that she was a spendthrift, but he finally decided that could be avoided and none was ever appointed. March 27, 1916, appellee wrote appellant asking him to buy the residence property in Jacksonville. Appellant wrote her he did not want to buy it. He testified she then wrote him asking him to buy

her interest in all the land. She wrote him repeatedly about selling to him. Appellant did not want to buy it. He had no money and advised appellee not to sell. The first price she asked was \$21,000. Finally she offered to sell to him for \$18,000, and the agreement for the sale was made August 9, 1916, on the terms before stated. The proof shows appellee urged appellant to buy her out; that he did not want to do so; that he had no money to pay for it, and he did not at any time encourage her to sell. In August, 1917, appellee executed another deed to appellant to the Texas land for the purpose of correcting a misdescription in her former deed to him for the same land. Several letters written by appellee to appellant after she made him the deeds clearly show she understood the transactions. Before the first installment of interest came due on the \$15,000 mortgage note, she wrote appellant reminding him it was nearly due and requested him to send her a draft for it. In 1918 she wrote appellant four letters and sent him three telegrams demanding payment of interest on the note. November 29, 1918, her attorney in Texas wrote to appellant's attorneys that appellant was in default on the \$15,000 note; that appellee had authority to declare the whole amount due, with ten per cent attorney's fees, and was insisting that action be taken. Appellant had paid all interest due up to the time appellee began her suit in Texas, and he testified that the beginning of that suit was the first he knew of her dissatisfaction with the transaction between them. That suit was begun July 15, 1918, and after that appellee wrote appellant twice demanding payment of the interest and her attorneys wrote appellant's attorneys threatening foreclosure. The case in Texas was tried in the district court in October, 1919, by the same attorneys representing the parties in this case, and a decree was entered before the amended bill in this case was filed. The original bill in this case was filed November 17, 1919, more than a year after the Texas suit was begun, and prayed for the foreclosure of

the mortgage. In the Texas suit appellee asked that her deed to appellant for the land in that State be set aside for fraud and her unsoundness of mind, and in this State she was seeking by the original bill to obtain the benefit of her sale of the Illinois land made at the same time she made the deed for the Texas land. Appellee seeks to explain this action on the ground that she received information appellant had sold the Illinois farm land. She received a newspaper clipping in a letter from Ball, the executor, requesting her to show it to her Texas attorney. The clipping had a date line Virden, Illinois, October 22. It stated deeds had been recorded of a sale by the Midvalley Coal Company to James F. Miller of 120 acres of land immediately west of Virden, known as the Henrietta Duckels farm. Appellee's Texas attorney testified she showed him the clipping and Ball's letter about October 27, 1919, and he wrote Ball the same day to procure and send him a copy of the deed whereby appellant conveyed the land. October 28 he wrote appellee's Illinois attorneys about the statement in the newspaper clipping. The letter stated appellee had been hesitating whether to file a bill to set aside the deed or to foreclose the mortgage, but if appellant had sold the land she had no other remedy except foreclosure. Appellee testified she learned within a week after she received the clipping that appellant had not sold the Illinois farm land and she then left everything to her attorneys. She knew at least two weeks before the original bill was filed that appellant had not sold the land, and the inference is warranted that her attorneys were so informed, and not until after she had secured a decree in the district court of Texas setting aside her deed to the Texas land did she file her amended bill.

We cannot take the time and space to set out the evidence more fully, but we are convinced that there is an entire failure to prove the allegations of the bill as to appellee's condition of mind or that she did not voluntarily and un-

derstandingly execute the agreements and deeds. She acquiesced in the transaction for about two years before she began her suit in Texas and five years before she filed her amended bill in Illinois. Her many letters clearly show during all that time that she knew and comprehended the entire transaction. By her demand for and acceptance of the performance of the agreement before she brought her Texas suit, and her demands for performance even after bringing that suit, she ratified the agreements and transactions. Her bill to foreclose the mortgage, filed November 17, 1919, we cannot regard otherwise than a ratification with full knowledge of all the facts. It was filed a month after her attorney testified the suit in Texas had been tried. The excuse that she then believed appellant had sold the land is untenable. The bill did not make the reputed purchaser a party defendant, and she knew before filing it that the land had not been sold. No new information came to her concerning the alleged fraud of appellant after she filed her bill in Texas. That case was tried, as we have said, in October, 1919, on practically the same pleadings and evidence as in this case. Pursuant to the agreement of May 13, 1915, and about eight months after its date, appellee made deeds conveying to appellant the undivided half of all the land in Illinois, and seven months later made the contract for the sale of her interest in all the land to appellant except the coal underlying the Illinois farm land, and executed the deeds. As we have said, appellee's letters,—and there are many of them in the record,—show she understood all that she had done. Her Texas attorney in a letter to appellant September 14, 1918, about the Texas suit, which was begun the previous July, said: "From what I have seen of your sister, it appears she is quite capable of handling her business affairs," and the evidence in this record supports that statement.

It is contended by appellee that there was no consideration for the agreement of May, 1915, pursuant to which

she conveyed to the appellant a half interest in the Illinois land, and that the consideration for the sale to appellant pursuant to the agreement of August, 1916, was so grossly inadequate as to be conclusive evidence of fraud and warrants a decree setting aside the deeds. The consideration for the agreement between the parties of May, 1915, that the will be set aside and both share the estate the same as if no will had been made, except that appellant would allow appellee \$8000 more than he received, was the relinquishment by appellant of his right to contest the will. So far as this record shows, appellant was in good faith proposing to file a bill to contest the will. He had employed counsel and looked up evidence for that purpose. Ball, the executor of the will, wrote appellee May 6, 1915, it was rumored from a seemingly reliable source that appellant was going to contest the will, and if he did, there would be a long and costly legal battle. She had that information before she saw her brother on May 13, when the compromise agreement was made. Appellant at that time told appellee he was going to contest the will. He testified that when he called on her in May, 1915, he had no thought of a compromise; that she asked him what he would do if she agreed to set aside the will, and after much talk between them the agreement was made. A compromise of a disputed claim made in good faith, whereby the claim is extinguished, is a sufficient consideration to support an agreement. Courts will not inquire into the merits of the claim to determine whether it could have been successfully maintained in a suit brought to enforce it. If the claim is entertained in good faith and the parties disagree as to its reasonableness or legality, its compromise affords sufficient consideration to support a promise or agreement. (*Walker v. Shepard*, 210 Ill. 100; 6 R. C. L. sec. 72, p. 663; 13 Corpus Juris, 342.) The sale of appellee's remaining half of the land was made pursuant to a written contract executed August 9, 1916, which recited it was "in consummation of

and substitution for all former negotiations and agreements relating to the same subject matter" made by the same parties.

Appellee contends that the consideration paid her for the land was grossly inadequate and the deeds should be set aside on that ground. In determining that question we are confined to the value at the time of the sale, as shown by the proof. The value of the farm land in Illinois was shown to be \$25,000, the residence property \$3000, and the Texas land was worth, at the time of the sale, about \$6200 or \$6300. The consideration paid included the assumption of the debts of the estate, amounting to more than \$3000, and fully equaled the value of the land, the coal being reserved.

The evidence does not sustain appellee's contention of the existence of a fiduciary relation of appellant to her; that she trusted in and relied upon him, and that he abused her trust and confidence and imposed on her to her detriment. The mere fact of the relationship between them of brother and sister does not necessarily establish the evidence of a fiduciary relation. The term involves the idea of trust and confidence. To establish a fiduciary relation the evidence must disclose a state of facts showing confidence reposed on one side and resulting superiority and influence on the other. While a deed between parties where in a fiduciary relation exists is not necessarily void, a court of equity will not permit the dominant party to use his position to secure an undue advantage of the other and will require him to prove the transaction was fair. Wherever influence has been acquired and abused, confidence reposed and betrayed, relief will be granted the wronged party. The relation is said to exist where a special confidence is reposed in one who in equity and good conscience is bound to act in good faith with regard to the interests of the one reposing the confidence. (*Crosby v. Dorward*, 248 Ill. 471; *Mayrand v. Mayrand*, 194 id. 45; *Bordner v.*

Kelso, 293 id. 175; *Campbell v. Freeman*, 296 id. 536; 25 Corpus Juris, 1118.) The power of attorney appellee gave appellant July 3, 1916, authorizing him to do all things necessary to wind up and settle their mother's estate, we think of little weight on the question of a fiduciary relation in view of all the evidence. Appellant had for many years resided in California while appellee lived with her mother in Illinois and Texas. The relations between appellee and appellant had not been very friendly and cordial on account of the payment by their mother of appellant's debts before she made her will, and appellee's letters to appellant and others after her mother's death fail to show she reposed confidence in or relied on him to advise and protect her. On the contrary, her letters indicate she placed no such trust in him but was protecting her own interests. The sale of her land to appellant in 1916 was suggested by her and urged until he finally bought it.

We are firmly of the opinion the proof did not warrant the decree. We have before stated that appellant in this case prosecuted an appeal from the district court of Texas to the court of civil appeals. That court delivered an opinion June 17, 1920, reversing the decree of the district court and rendering judgment for appellant. The opinion sets out the pleadings and evidence at great length and covers twenty-three pages of the record. The pleadings and evidence were substantially the same there as here. The opinion sets out the findings of the decree of the district court upon which it decreed that the deeds to the Texas land be set aside, and the court held there was no material evidence to support the findings and decree of the district court. The court said in part: "We have carefully examined and considered all the evidence and circumstances proven favorable to plaintiff, disregarding all evidence adverse thereto, and after such examination and consideration have reached the conclusion that from these facts and circumstances all

reasonable men can draw but one conclusion, and that is that they do not support the material findings of the court hereinbefore set out nor the judgment rendered, but, to the contrary, they do conclusively show that at the time Nellie executed the contract of August 9, 1916, and all the deeds under its terms, she was fully capable of understanding, and that she did understand and appreciate, what she was doing, and that of her own free will she intended to, and did, convey to Neil the three tracts of land described in said deeds for the consideration therein expressed; that they do conclusively show that the lands conveyed by said deeds were not worth more than the price paid therefor by Neil and that Neil derived no enormous profit out of his transactions with Nellie, and that they do unquestionably and conclusively show that long after Nellie fully understood and appreciated all the details of her transaction with Neil she collected interest due on the \$15,000 note given in part payment for the land conveyed by her, and even after her marriage and after she filed this suit she sought benefits under the contract which she now by this suit seeks to rescind, and that by accepting such benefits she ratified the contract and cannot now repudiate the same and avoid its provisions." A motion for rehearing was filed, and on the motion the court said it adhered to the conclusion stated in its opinion, but had concluded, as the facts may not have been fully developed, the judgment should be set aside and a judgment entered reversing the decree and remanding the case for another trial. We are unable to take any other view of the evidence than that taken by the Texas court of civil appeals.

The decree is reversed and the cause remanded.

Reversed and remanded.

(No. 14491.—Reversed and remanded.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. LEWIS WALLACE *et al.* Plaintiffs in Error.

Opinion filed June 21, 1922.

1. CRIMINAL LAW—*indictment for larceny need not use word "personal" in describing the property taken.* The word "personal" is not a technical or necessary word of description that is required in describing the property in an indictment for larceny, but the words "goods and chattels," when used to qualify or describe the character of the stolen property, are sufficient to designate the property as personal property and subject to larceny.

2. SAME—*summoning grand jurors by mail, if not prejudicial, is not fatal to indictment.* The fact that the members of the grand jury were notified by mail to appear before the court as grand jurors and not by service of summons, as required by law, is not fatal to the indictment, where there is no showing that the substantial rights of the defendants were thereby prejudiced.

3. SAME—*corpus delicti in larceny must be proved beyond reasonable doubt.* In a prosecution for larceny it is incumbent upon the People to prove the *corpus delicti* beyond a reasonable doubt, and such proof, under an indictment for the larceny of hogs, includes the establishment of the facts that the property alleged to have been stolen was lost to the owner by a felonious stealing, taking or driving away.

WRIT OF ERROR to the Circuit Court of Edgar county;
the Hon. JOHN H. MARSHALL, Judge, presiding.

WILBER H. HICKMAN, for plaintiffs in error.

EDWARD J. BRUNDAGE, Attorney General, GEORGE W. BRISTOW, State's Attorney, and GEORGE C. DIXON, for the People.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

An indictment was returned by the grand jury of Edgar county, at the November term, 1921, against James Wallace, Lewis Wallace and Orion Dunn, charging them with the larceny of eleven hogs, of the goods and chattels

of Jacob Littlefield, of the value of \$200. The cause was continued as to James Wallace, and Lewis Wallace and Orion Dunn were tried together on a plea of not guilty, convicted, and sentenced to the penitentiary for an indeterminate term.

The main facts upon which the State secured a conviction of plaintiffs in error were testified to by Jacob Littlefield, owner of the hogs in question, and J. C. Riddell and Robert Riddell. The substance of Littlefield's testimony is the following: He lived on a farm eleven miles northeast of Paris, in said county, and a mile and a half north of Joe Keys' farm. In 1921 he raised about 300 hogs and kept them on a certain eighty acres of his farm, with his cattle. This eighty-acre tract was enclosed by a wire fence forty inches high, except about twenty rods, which was a new rail fence. In May of 1921 there were in this enclosure 122 hogs. On July 25 he shipped and sold 61 hogs, leaving in the pasture 61 hogs, which at that time were counted by him. These hogs were mixed, the majority of them being red hogs and the others white and black. They weighed about 225 pounds in July and would have weighed about 260 pounds on August 22, 1921. He never counted his hogs after July 25 until September 6, 1921, at which latter date he had only 50 hogs in the field and had not missed any of them before that date. He did not know what became of the 11 missing hogs and saw no place where they could have gotten out of the field. He testified that he did not know whether they were stolen or how they got away, and that it would not have been impossible for the hogs to have gotten out under the wire fence. He did know that none of his hogs had died on his farm.

The substance of the testimony of the two Riddells is the following: They began running a truck about July, 1921. James Wallace, indicted with the plaintiffs in error, engaged them to haul with their truck 11 hogs to Terre Haute, Indiana. J. C. Riddell, father of Robert Riddell,

resided four miles southeast of Paris. On the night of August 22, 1921, he went to the home of his son, in Paris, for the purpose of making the trip to Terre Haute the next morning. The two Riddells left Paris with their truck about midnight and drove north about five miles to a point where the road was crossed by a narrow lane running east and west, where they met James Wallace, who opened the gate for them leading into a field of Joe Keys. From this gate they drove straight east through the field about three-quarters of a mile to a fence on Keys' farm, where they were met by plaintiffs in error, who were attending 11 hogs enclosed in a temporary wired pen. James Wallace rode with the Riddells on the running-board of the car from the point where they met him to the place where the hogs were penned. The 11 hogs were loaded into the truck and hauled to Terre Haute by the Riddells and sold to the Home Packing Company for \$238. The check for the hogs was made payable to J. C. Riddell, who cashed it, and he testified that he later turned the money over to James Wallace on Main street, in Paris, near the Union station, about two o'clock in the afternoon of August 23, 1921, after deducting \$35 for hauling the hogs to Terre Haute. The Riddells left with the hogs about two o'clock in the morning of August 23. Robert Riddell, James Wallace and the plaintiffs in error loaded the hogs on the truck by placing a door, or some structure of like character, upon the rear end of the truck and driving the hogs over it into the truck while J. C. Riddell stood at the side and kept the hogs from going through the fence. J. C. Riddell testified that he did not know what kind of hogs were loaded and did not know their weight or color and did not know whose hogs they were. Robert Riddell testified that the 11 hogs were red and black, the greater number of them being red, and that they weighed about 255 pounds each, and that all of the hogs were either red or black and that there were no mixed colors among them. Also that James Wallace said to him,

in the presence of plaintiffs in error, that he did not want to go to Terre Haute himself on account of his brother, Lewis, having gotten into a cutting scrape in Terre Haute, and asked the witness and his father if they would take the hogs to Terre Haute. He inquired of them what time they would get back to Paris from Terre Haute, and on being informed that they would get back that afternoon and that they would take the hogs to Terre Haute and sell them, he asked them to meet him in Paris on their return. It further appears from the evidence that Robert Riddell was a deputy sheriff and testified before the grand jury against the plaintiffs in error. He testified on rebuttal that on the night of November 16, 1921, (the day the plaintiffs in error were arrested and on which the witness appeared before the grand jury,) the plaintiffs in error came to his home, and that Lewis Wallace said to him, "We are in a hell of a fix," and that witness replied, "Yes; it looks like it." He stated that they then asked him if he testified before the grand jury that he had hauled hogs out of Keys' farm, and he told them that he had; that they then said, "Why the hell didn't you deny hauling hogs?" and he told them that he was on oath and was supposed to tell the truth. He also stated that they then told him that he had better leave the State, and that Lewis Wallace turned to Jim Wallace, who was also with the plaintiffs in error, and said that they had better see witness to-morrow, but that he did not see them.

Homer Hill, who was not very well acquainted with the Wallace brothers, testified that he saw them in Paris about the 20th or 23d of August, 1921, behind the *Beacon* office, in which he worked, and that one or the other of them,—he did not know which,—had a large roll of money in his hand.

Lewis Wallace and Orion Dunn testified on their own behalf and denied *in toto* the testimony of the Riddells in regard to their hiring or having anything to do with hiring

them to haul hogs to Terre Haute or having helped to load the hogs, and testified positively that they had nothing to do with the hogs and knew nothing about their having been stolen from Littlefield. They further testified that they left Paris together for Terre Haute on the three o'clock car on the afternoon of August 22, 1921, and arrived at Terre Haute about four o'clock that afternoon; that they walked around town until supper time, and after supper they attended a dance at Gable's dance hall until twelve o'clock that night; that they then played a gambling game called "chicklet" with several others in a room adjoining the dance hall until about three o'clock in the morning, and from there went to a house of ill-fame, where they remained until about nine o'clock the next morning. They further testified that they returned from Terre Haute to Paris about one o'clock in the afternoon of August 23, where they met James Wallace and accompanied him in his car to Martinsville, Illinois, to the county fair grounds, where they had some race horses for the fair. They gave as a reason for being able to fix said dates the fact that the Martinsville fair began on Wednesday, August 24, 1921. They were corroborated in their testimony by Jacob Gable, the proprietor of the dance hall in Terre Haute, who testified that he saw them there from eight o'clock P. M. until twelve o'clock of August 22; also by Bruce Walsh, who handled and trained horses for the Wallaces, and who testified that he was in Terre Haute on the evening of August 22, 1921, and saw plaintiffs in error there. They were further corroborated by Fred Edwards, Lewis Wallace's brother-in-law, who testified that he was in Terre Haute on the evening of August 22 and saw plaintiffs in error there at that time. Three other witnesses testified that it would be almost impossible to drive a Ford truck across the field from the road to the place the Riddells claimed to have loaded the hogs. Joe Keys, the owner of the land over which the truck is claimed to have been driven and upon whose land it is claimed the

hogs were loaded, testified that he was over his farm every day during August, 1921, looking after sheep, and that he did not at any time see a hog-chute or any hogs on his land, and did not see any tracks at the gate or across the field where the truck is alleged to have been driven. Plaintiffs in error also deny the testimony of Robert Riddell as to what took place at his house on the night of November 16, 1921, and in which he stated that they asked him or suggested to him that he leave the State, etc. They testified that they were at his house on or about that time but that they were there trying to sell him butchered meat for his butcher shop in Paris, and that no mention was made of the charge against the plaintiffs in error at that time.

The first error assigned by plaintiffs in error is that the indictment should have been quashed because it did not contain in the allegation of ownership of the hogs the word "personal," the allegation being that the hogs were "of the goods and chattels of Jacob Littlefield," instead of alleging that they were "of the personal goods and chattels of Jacob Littlefield." The word "personal" is not a technical or necessary word of description that is required in the description of property stolen. The words "goods and chattels," when used to qualify or describe the character of property stolen, are sufficient to designate the property as personal property and subject to larceny. It is well known to laymen, as well as to lawyers, that hogs are personal property, and when they are further described as "goods and chattels" of another, all doubt is dispelled as to the nature of the charge in the indictment being the stealing of hogs,—a very common and well known species of live stock. The omission of the word "personal" did not render the indictment fatally defective, and the motions to quash and to arrest the judgment for such omission were properly overruled by the court. 25 Cyc. sec. 3, p. 75; *State v. Parker*, 36 Am. Rep. 5.

The indictment is also attacked upon the ground that the members of the grand jury were notified by mail to appear before the court as grand jurors and not by service of summons, as required by law. There is no evidence whatever to show, and there was no attempt to show, that the substantial rights of the plaintiffs in error were prejudiced by this method of summoning grand jurors, and without such a showing it was not error to require them to go to trial upon the indictment returned by such grand jurors.

It was incumbent upon the People in this case to prove the *corpus delicti* beyond a reasonable doubt. This rule is well established in criminal cases and requires no citation of authority to support it. The *corpus delicti* in this case consisted of two elements: (1) The establishment of the fact that the hogs in question were lost to the owner, Jacob Littlefield; and (2) that they were lost to him by a felonious stealing, taking and driving away. Both of these elements or facts must be established beyond a reasonable doubt before the conviction of plaintiffs in error can be sustained. We have stated substantially all of the evidence in the record, and while the testimony of the People's witnesses is a very remarkable story, casting strong suspicion upon the plaintiffs in error and others, yet it does not satisfactorily prove the *corpus delicti*. This is so because there is not a single witness that undertakes to testify that the hogs in question were the hogs of Littlefield, and the few circumstances testified to by the witnesses are not sufficiently certain and definite to supply the evidence which the witnesses could not furnish from their own knowledge. The hogs that Littlefield lost were not definitely described. All that the record shows is,—and that by inference,—that they were red or black or white or mixed-colored, or that some were red and some black and some white and some mixed-colored. The record furnishes no other mark upon Littlefield's hogs by which they might be identified as the 11 hogs testified about by the Riddells. The best that the record re-

veals is that Littlefield's hogs were about the same size as the 11 hogs taken from Keys' field and of about the same weight, and that they might possibly be of the same color as the hogs lost by Littlefield. For the same reason it can not be said that the defendants were proven guilty, beyond a reasonable doubt, of stealing 11 hogs from Littlefield, as charged in the indictment, although they were probably of the same size and the same in number as those hauled by the Riddells and sold in Terre Haute.

We think that a proper regard for the legal rights of the plaintiffs in error demands a reversal of the judgment in this case. The judgment is accordingly reversed and the cause remanded for a further trial.

Reversed and remanded.

(No. 14629.—Writ dismissed.)

HUGH A. MASON *et al.* Plaintiffs in Error, *vs.* M. F.
BROWNER *et al.* Defendants in Error.

Opinion filed June 21, 1922.

1. DRAINAGE—*writ of error does not lie to review proceeding to abolish district—joinder in error.* A writ of error does not lie from the Supreme Court to the county court to review a proceeding to abolish a drainage district, but if no objection is made and there is a joinder in error the Supreme Court may treat the writ of error as an appeal and review the case. (*Boston v. Kickapoo Drainage District*, 244 Ill. 577, *Deneen v. Deneen*, 293 id. 454, and *Wetaug Drainage District v. Illinois Central Railroad Co.* 297 id. 350, explained.)

2. APPEALS AND ERRORS—*when Appellate Court cannot transfer cause to Supreme Court.* The Appellate Court has no authority, under section 102 of the Practice act, to transfer to the Supreme Court a proceeding which the latter court is without jurisdiction to review, but in such case the Appellate Court, if it is without jurisdiction, should dismiss the writ of error.

WRIT OF ERROR to the County Court of Pulaski county;
the Hon. A. L. SPILLER, Judge, presiding.

DANIEL HOGAN, JR., (WALTER T. GUNN, of counsel,) for plaintiffs in error.

GILBERT & GILBERT, C. S. MILLER, CHARLES L. RICE, and GEORGE E. MARTIN, for defendants in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

Plaintiffs in error filed their petition in the county court of Pulaski county for abandonment of the Mounds Drainage District, under section 44 of the Levee act. (Hurd's Stat. 1921, p. 1225.) Motions to strike the petition from the files were made by the commissioners of the district and also by certain alleged creditors of the district. The motions were allowed, and plaintiffs in error prayed an appeal to the Appellate Court, which was not perfected. They have sued out a writ of error from the Appellate Court to the county court, and the Appellate Court transferred the cause to this court.

The Appellate Court held that drainage districts are solely creatures of the statute and the statute as to such districts must be followed both in their organization and abandonment. (*Bissell v. Edwards River Drainage District*, 259 Ill. 594; *Wetaug Drainage District v. Illinois Central Railroad Co.* 297 id. 350.) The Appellate Court referred in its opinion to the opinion of this court in the *Wetaug Drainage District case*, which held that a proceeding to organize a drainage district is purely statutory and that a writ of error is not a writ of right, and that one suing out a writ of error must be able to point to a statute creating the right, and that no such statute was pointed out in that case, and that therefore the writ of error was dismissed, citing *Loomis v. Hodson*, 224 Ill. 147, and *Cataldo v. Osti-uso*, 253 id. 138. (See, also, to the same effect, *Sweeney v. Chicago Telephone Co.* 212 Ill. 475.) The Appellate Court, however, did not dismiss the writ of error sued out of that court but transferred the cause to this court. This

was apparently because this court in *Boston v. Kickapoo Drainage District*, 244 Ill. 577, and *Deneen v. Deneen*, 293 id. 454, had entertained writs of error from the county court where somewhat similar questions were involved with reference to abolishing drainage districts.

It is assumed by the Appellate Court in its opinion transferring this cause that there is a conflict on the question of jurisdiction of this court to review drainage cases in the opinions in *Boston v. Kickapoo Drainage District*, *supra*, and *Deneen v. Deneen*, *supra*, and that in *Wetaug Drainage District v. Illinois Central Railroad Co.* *supra*. We cannot agree that there is any conflict in the opinions of this court on this subject. It has been held that in cases under the Drainage act there can be an appeal from the county court to the Supreme Court. (*Kline v. Barnes*, 250 Ill. 404.) This court having jurisdiction in such matters by appeal, if a drainage case is brought here by writ of error and no motion is made to dismiss the proceedings and the defendants in error join in error in this court, the case will be considered as if it had been properly brought here by appeal. It has been a consistent rule of this court for many years that a criminal case should be brought to this court by writ of error, but if it is brought here by an appeal and the People join in error such case will be considered and decided by this court as if it had been brought here by writ of error. (*Mohler v. People*, 24 Ill. 26; *Dinet v. People*, 73 id. 183; *Graff v. People*, 208 id. 312.) Many years ago it was held by this court in a civil proceeding, (*Ryan v. Anderson*, 24 Ill. 652,) that where the parties by agreement bring the case to this court by appeal and error is the appropriate remedy the court will decide the case on the merits, the opinion stating: "The court having jurisdiction of the subject matter, consent will give jurisdiction over the person. By agreement these parties are properly in court. Although error was the appropriate mode of procedure to bring the parties before the court, yet the remedy does not

depend upon the process, and the agreement precludes the parties from taking advantage of the means adopted to bring them before this tribunal." The cases of *Boston v. Kickapoo Drainage District*, *supra*, and *Deneen v. Deneen*, *supra*, were both brought to this court by writ of error, and in each case the defendants in error joined in error in this court and did not raise any question as to the cause being improperly brought here by writ of error. It is clear, therefore, under the authorities just cited, this court had jurisdiction to decide the cases, and there is no conflict, direct or otherwise, between the rulings of the court in the *Boston* and *Deneen* cases, *supra*, in taking jurisdiction and deciding those cases, and the holding of this court in the *Wetaug* case, *supra*. Had a motion in either the *Boston* case or the *Deneen* case been made to dismiss the proceedings on the ground that the court was without jurisdiction because the case had been improperly brought here by writ of error, this court would have dismissed the case in accordance with the ruling in *People v. Johnson*, 285 Ill. 194.

The Appellate Court transferred the cause to this court, stating that it did so under the provisions of section 102 of the Practice act. (Hurd's Stat. 1921, p. 2472.) This section of the Practice act only authorizes the Appellate Court to transfer a cause to this court when this court has jurisdiction, and does not authorize it to do so when this court is without jurisdiction. We find no question raised on this record that in any way can give this court jurisdiction. The only question argued and discussed is as to the right to bring the cause to this court by writ of error, and it being urged by defendants in error that it was improperly brought to this court by writ of error, it must be held that the court is without jurisdiction to decide the case.

The writ of error will be dismissed. *Writ dismissed.*

(No. 14668.—Decree affirmed.)

JAMES M. ROBNETT *et al.* Plaintiffs in Error, *vs.* F. B. MILLER *et al.* Defendants in Error.

Opinion filed June 21, 1922.

1. APPEALS AND ERRORS—*when a freehold is involved.* A freehold is involved where the necessary result of the judgment or decree is that one party gains and the other loses a freehold estate, or when the title is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue; and a writ of error is properly sued out of the Supreme Court where a reversal of the decree will cause one party to lose a freehold and the other to gain such estate.

2. DEEDS—*what evidence necessary to have a deed declared a mortgage—burden of proof.* To warrant the court in declaring a deed absolute in form to be a mortgage, the evidence must be clear, definite, unequivocal, convincing and satisfactory, and the burden rests upon the party asserting that the deed is a mortgage to show that fact by such evidence.

3. SAME—*party asserting that deed is a mortgage must show an equity in the transaction.* A party asserting that a deed absolute in form is a mortgage must show the existence of an equity in the transaction contrary to the terms of the deed; and the mere allegation of a contemporaneous understanding inconsistent with the terms of the deed, but independent both of the deed itself and of the understanding when it was executed, is not sufficient.

4. SAME—*when equity will enforce forfeiture in contract for sale of land.* While forfeitures are not regarded with favor by courts of equity, yet if the parties have made time of the essence of the contract a court of equity has no more right than a court of law to dispense with the express stipulation of the parties, where no fraud, accident or mistake has intervened; and equity will carry out a forfeiture provision in such a contract for the sale of land where its enforcement cannot be regarded, under the evidence, as being inequitable.

WRIT OF ERROR to the Circuit Court of Marion county; the Hon. THOMAS M. JETT, Judge, presiding.

L. B. SKIPPER, and E. B. VANDERVORT, for plaintiffs in error.

WHAM & WHAM, and NOLEMAN, SMITH & DALL-
STREAM, for defendants in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was a bill filed in the circuit court of Marion county asking to have a deed to nine lots in Centralia, in said county, declared a mortgage. Defendants in error answered the bill denying that the deed was a mortgage, and filed a cross-bill, in which they asked that a certain contract be declared forfeited and that a deed given by plaintiff in error James M. Robnett to his son, C. C. Robnett, to two of said lots, might be canceled. After the pleadings were settled the case was heard by the chancellor, and a decree was entered in favor of defendants in error on their cross-bill, the original bill as amended being dismissed for want of equity. The case has been brought here by writ of error.

In March, 1905, James M. Robnett and his wife, he then being the owner of twelve lots in Schoolsite addition to Centralia, conveyed them by warranty deeds to A. H. Young. In April, 1907, Young and his wife conveyed the lots by warranty deed to defendant in error Isaac O. Hester, and on the same date Hester entered into a contract with Robnett by which it was agreed that Hester would convey the twelve lots to Robnett for a consideration of \$1500, and Robnett agreed to pay the consideration for the same on or before April 2, 1908, with interest at seven per cent, Robnett to pay the taxes and assessments levied subsequent to the year 1906. The contract contained a provision that in case of failure of the second party to make either of the payments or any part thereof, or perform any of the covenants on his part, the contract should, at the option of the first party, be forfeited and determined and the second party should forfeit all payments made by him, and such payments should be retained by the first party in full satisfaction and in liquidation of all damages by him sustained, and he should have the right to re-enter and take posses-

sion of the premises. The contract also provided that time should be the essence of the contract. There was a further provision that the first party agreed to execute and deliver a good and sufficient deed to the second party of any lot described in the contract on the payment of \$125 and interest to the first party, and that the second party might have deeds to any or all of such property under the same terms and conditions. The record shows that in 1908 Robnett paid Hester \$375, and Hester deeded him three of the lots in accordance with the provisions of the contract. The record also shows that under this contract between Robnett and Hester, Robnett made other payments, one of \$40 on October 9, 1907, one of \$65 on April 2, 1908, and one of \$5 at a date not shown. On May 22, 1920, Hester conveyed the nine lots in question still standing in his name to defendants in error B. M. English and F. B. Miller, the deed to them stating that it was subject to the contract dated April 2, 1907, between Hester and Robnett. English and Miller, on the day they received the deed, or very shortly thereafter, served a notice on Robnett stating that he had defaulted in the terms agreed upon in the contract and had been in default since November 6, 1913, and had suffered the premises to be sold for non-payment of taxes, and that English and Miller thereby declared the contract forfeited and determined, and that all payments made thereon were forfeited and would be retained by them in full satisfaction and liquidation of all damages unless Robnett should, on or before June 2, 1920, pay the balance due, and interest, and refund all moneys paid for taxes. It does not appear from the record that Robnett took any steps in response to this notice within the time therein mentioned or communicated in any way with defendants in error with reference to the same. The record shows that on July 24, 1920, Miller and English entered into a contract with a builder for the construction of two houses on the property, costing approximately \$2000 each, the houses to be com-

pleted during the summer. In September, 1920, after the completion of said houses, this bill was filed in the circuit court. The record also shows that Robnett and his wife conveyed to their son, Chauncy, two of the lots in question in June, 1913. Chauncy testified that he paid his father \$510 for one of these lots in installments, and that the other lot was a present to him from his father. Young, who received the deeds from Robnett for the twelve lots and afterwards conveyed the nine lots here in question to Hester, died some time before the trial.

Counsel for defendants in error argue that this court does not have jurisdiction of this case but that it should have been taken to the Appellate Court, as no freehold is involved. This court has held that a freehold is involved, "within the sense of the constitution and statute, only in cases where the necessary result of the judgment or decree is that one party gains and the other loses a freehold estate, or when the title is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue." (*Prouty v. Moss*, 188 Ill. 84; *Malacr v. Hudgens*, 130 id. 225; *Sanford v. Kane*, 127 id. 591.) In case the decree of the circuit court should be reversed in this proceeding Miller and English would lose a freehold and Robnett and his son would gain such a freehold. The writ of error was properly sued out direct to this court.

Plaintiffs in error claim that the original deeds to these lots from James M. Robnett and wife to Young were given as security for an indebtedness and were in the nature of mortgages, and that the deed from Young and his wife to Hester was given with the understanding between Robnett, Young and Hester that it should be taken as security for the indebtedness owed by Robnett to Young and thereafter to Hester. Section 12 of chapter 95 of our statutes provides: "Every deed conveying real estate, which shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in

terms, shall be considered as a mortgage." (Hurd's Stat. 1921, p. 2150.) To warrant the court in declaring a deed absolute in form to be a mortgage, the evidence must be clear, definite, unequivocal, convincing and satisfactory. *Friend v. Beach*, 276 Ill. 397; *Helm v. Boyd*, 124 id. 370; *Fisher v. Green*, 142 id. 80; *Illman v. Kruse*, 301 id. 408.

The principal testimony on behalf of plaintiffs in error on the point that the deed was given as security for money loaned was that of James M. Robnett. He testified that he was seventy-three years of age at the time of the hearing, and while evidently very firm in the belief that the deeds from himself to Young, and from Young to Hester, were given as mortgages, we are unable to ascertain from his testimony, or any other evidence in the record, when or in what amounts any money was loaned by Young to him, or what rate of interest was to be paid, or when the loans were to be due, so far as relates to the transaction between Robnett and Young. It is evident that Robnett himself had no clear recollection as to when the transactions as to various loans between himself and Young took place, or what the amounts were, or what the agreements were with reference to the same. There is no evidence in the record before us upon which to base a clear and definite decree as to the existence or the terms of an indebtedness for which the deed from Robnett to Young might be considered as security. As we understand their argument, counsel for plaintiffs in error insist that Robnett borrowed the money from Hester to pay his indebtedness to Young, and that Young, as a part of the same transaction, then deeded the lots to Hester, and that this deed from Young to Hester was understood, in effect, to be a mortgage given by Robnett to Hester. The record shows that Hester is a brother of Sarah E. Young, wife of A. H. Young. Mrs. Young testified that her understanding was that at the time the deed was made to her brother by herself and husband her brother had furnished the money to pay her husband off,

and that these lots were deeded over to him for that money. It is obvious, however, from a reading of her testimony, that she had no definite information on this subject as to the conveyance of this property by her husband to Hester.

This court has said that the rights purporting to be conveyed by deed absolute in form must be taken as being such rights unless the parties show an equity to the contrary, and that the mere allegation of a contemporaneous understanding inconsistent with the terms of the deed but independent both of the deed itself and of the understanding with which it was executed is not such a showing to the contrary; that "the right must be one paramount to and independent of the terms of the deed as well as of any understanding between the parties at the time it was executed. Parol evidence is admissible so far as it conduces to show the relations between the parties or to show any other fact or circumstance of a nature to control the deed and to establish such an equity as would give a right of redemption, and no further. In the application of this rule parol evidence is received to establish the fact that a debt existed or that money was loaned on account of which the conveyance was made, for such facts will in a court of equity control the operation of the deed." (*Kelly v. Lehmann*, 297 Ill. 33. See, also, to the same effect, *Sutphen v. Cushman*, 35 Ill. 186.) This court has frequently held that the burden rests upon the one asserting a deed absolute in form to be a mortgage to show that fact by clear, satisfactory and convincing proof. (*Totten v. Totten*, 294 Ill. 70, and cases there cited.) The evidence in the record is not at all clear as to what understanding there was, if any existed, other than what the deed itself showed, between Young and Hester at the time the deed was made, or whether Hester himself had any talk with Robnett, at the time Young made the deed to him for these lots, as to the nature of the transaction. It is true that Robnett did state in one portion of his testimony that Hester was present at the time the deed

was made by Young to Hester, and that the contract between Hester and himself as to his right to redeem the property was executed at the same time, but it appears manifest upon further examination of Robnett's testimony that he was not at all certain that Hester was present, and it is quite obvious from the contract itself that Hester was not present, because it shows it was signed for him by Young. It is also evident that Robnett himself was not sure that he had any talk with Hester as to the deed being understood to be a mortgage.

The record does not show the evidence to be of such clear, satisfactory and convincing character as to justify the holding that the deed from Young to Hester was taken as a mortgage to protect the payment of a loan by Robnett. Moreover, there is nothing shown in this record that would tend strongly to prove that the deed from Hester to Miller and English was taken with any understanding on the part of the grantees that the deed from Young to Hester was taken as security for a debt. It is true, the deed to Miller and English was made subject to the contract of April 2, 1907, between Hester and Robnett, of the existence of which contract they were informed, but there is nothing in the record to show that they had any notice that Robnett claimed the deed to Hester was only a mortgage. The record shows that nothing had been paid on the contract between Robnett and Hester for about twelve years. The only money paid under said contract, other than the \$375 for the three lots which were deeded to Robnett, was \$110, which would only be a little more than one year's interest. It is conceded that Robnett had paid the taxes on the lots in question after making the contract, with the exception of one year in which the lots were sold for taxes and redeemed by Hester. The circumstances shown in this record would indicate, in some degree, there might have been some sort of an understanding between the parties to the contract that Robnett might be allowed to complete it

even though he had defaulted for some space of time on the principal, but there is nothing to indicate that Miller and English had any idea that Robnett or his son had any right to consider the deed to Hester simply a mortgage, or to obtain the title to any of these lots by paying \$125 and interest therefor. Miller and English gave Robnett notice that the contract was forfeited unless he paid the amount due in ten days. During that time he did not communicate with them so far as shown by the record, and it also appears that he allowed them to improve two of the lots with houses costing over \$2000 each,—an amount much greater than Robnett could have redeemed these two lots for under the contract. It is true, as contended by counsel for plaintiffs in error, that forfeitures are not regarded with favor by courts of equity, but this court has held consistently that parties to a contract for the sale of land may make time the essence of the contract. (*Tyler v. Young*, 2 Scam. 444; *Glover v. Fisher*, 11 Ill. 666; *Morgan v. Herrick*, 21 id. 481; *Bishop v. Newton*, 20 id. 175; *Wynkoop v. Coving*, 21 id. 570; *Murphy v. Lockwood*, 21 id. 610; *Dennis v. McCagg*, 32 id. 429; *Sanford v. Emory*, 34 id. 468; *Milnor v. Willard*, 34 id. 38; *Cunningham v. Illinois Central Railroad Co.* 77 id. 178.) A court of equity has no more right than a court of law to dispense with an express stipulation of parties in regard to time, in contracts of this nature, where no fraud, accident or mistake has intervened. (*Heckard v. Sayre*, 34 Ill. 142.) The contract of April 2, 1907, between Robnett and Hester stated in clear terms that time was the essence of the contract, and it certainly cannot be held that the enforcement of this forfeiture against Robnett, under the contract and the evidence shown in the record, is in any manner harsh. On this record, to find that the deed from Young to Hester was simply given as security for the indebtedness of Robnett would be, as against the rights of Miller and English, most unjust. Without question, the evidence in the record

is not of that clear, convincing and satisfactory character to justify any such conclusion.

The chancellor rightly dismissed the original bill for want of equity. The decree of the circuit court will be affirmed.

Decree affirmed.

(No. 14544.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. SADIE COHEN, Plaintiff in Error.

Opinion filed June 21, 1922.

1. CRIMINAL LAW—*sufficiency of indictment or information in petit larceny is determined by Criminal Code.* As petit larceny is not a common law offense but is defined by and punished under the Criminal Code, the indictment or information must be construed in accordance with the code and will be deemed sufficiently technical if it states the offense in the terms and language of the code or so plainly that the nature of the offense charged may be easily understood by the jury.

2. SAME—*when strictness of pleading is required.* Great niceties and strictness of pleading should be countenanced and supported only when it is apparent that the defendant may be surprised on the trial or unable to meet the charge or make preparations for his defense for want of greater certainty or particularity.

3. SAME—*when information charging petit larceny of money is sufficient.* An information in petit larceny charging the taking of "one dollar (\$1) good and legal money of the United States of America," is sufficient to inform the defendant and the jury of the nature of the offense charged, and on the common law record it will be sufficient to sustain a judgment of conviction.

WRIT OF ERROR to the Second Branch Appellate Court for the First District;—heard in that court on writ of error to the Municipal Court of Chicago; the Hon. HUGH R. STEWART, Judge, presiding.

ANDALMAN, KOSTNER & ARVEY, (MAXWELL N. ANDALMAN, of counsel,) for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, ROBERT E. CROWE, State's Attorney, and VIRGIL L. BLANDING, (EDWARD E. WILSON, CLYDE C. FISHER, and ALVA L. BATES, of counsel,) for the People.

MR. CHIEF JUSTICE THOMPSON delivered the opinion of the court:

Plaintiff in error, Sadie Cohen, was charged by an information filed in the municipal court of Chicago with the larceny of "one dollar (\$1) good and legal money of the United States of America, of the value of one dollar," from Mitci Klaffenbok. A plea of not guilty was entered, a trial by jury was waived in writing and the cause was heard by the court. Plaintiff in error was found guilty and sentenced to three months' imprisonment in the house of correction and to pay a fine of one dollar and costs. The judgment of the municipal court was affirmed by the Appellate Court for the First District, and this writ of error is prosecuted to review its judgment.

The sole question presented for review is the sufficiency of the description of the property stolen. There was no motion to quash the information and no motion in arrest of judgment. Section 9 of division 11 of the Criminal Code provides that all exceptions which go merely to the form of an indictment (or information) shall be made before trial, and no motion in arrest of judgment or writ of error shall be sustained for any matter not affecting the real merits of the offense charged in the indictment (or information). Petit larceny is not a common law offense but is an offense defined by our Criminal Code. Since petit larceny is defined by and required to be punished under the Criminal Code, which is a codification of the criminal law, the indictment or information must be construed in accordance with the code, and it shall be deemed sufficiently technical and correct if it states the offense in the terms and language of the code or so plainly that the nature of

the offense charged may be easily understood by the jury. (Hurd's Stat. 1921, p. 1149; *People v. Connors*, 301 Ill. 112; *People v. Jordan*, ante, p. 316.) Great niceties and strictness of pleading should only be countenanced and supported when it is apparent that the defendant may be surprised on the trial, or unable to meet the charge or make preparations for his defense for want of greater certainty or particularity. (*Cannady v. People*, 17 Ill. 158.) The criminal law is fast outgrowing those technicalities which grew up when the punishment for crime was inhuman and when it was necessary for the courts to resort to technicalities to prevent injustice from being done. Those times have passed, for criminal law is no longer harsh or inhuman, and it is fortunate for the safety of life and property that technicalities to a great extent have lost their hold. "One dollar (\$1) good and legal money of the United States of America," is a definite and certain description of a piece of money of a fixed value, and there is not the slightest basis in common sense or in principle for the contention that either the defendant or the judge would have any difficulty in understanding the nature of the offense charged. Because of earlier decisions of this and other courts when the strict rules of pleading of the common law were controlling the decisions of the courts, counsel for plaintiff in error are fully justified in presenting this case to the court for decision and in the argument they make in their brief, but we are convinced that neither principle nor authority will justify us in adhering to the strict technicalities. The information was sufficient to sustain the judgment. Whether the proof actually showed the larceny of one dollar or the larceny of some other property or coins of the value of one dollar is a question with which we are not now concerned, because the case is here on the common law record.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(No. 14555.—Reversed and remanded.)

ALEXANDER NAGY *et al.* Appellants, *vs.* FRANK BELLA *et al.*
Appellees.

Opinion filed June 21, 1922.

SPECIFIC PERFORMANCE—*when it is error to dismiss the bill—
injunction.* A prayer for an injunction until the cause is heard is
merely collateral to the relief prayed in a bill for specific perform-
ance, and it is error, on dissolving the temporary injunction, to
dismiss the bill if the bill, though insufficient in some of its aver-
ments, is capable of amendment.

APPEAL from the City Court of West Frankfort; the
Hon. A. D. MORGAN, Judge, presiding.

FRANK E. TROBAUGH, and LAYMAN & JOHNSON, for
appellants.

J. E. CARR, J. P. MOONEYHAM, and W. F. DILLON, for
appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the
court:

The appellants, Alexander Nagy and Jeanette Nagy,
filed their bill in the city court of the city of West Frank-
fort praying that appellees, Frank Bella and Victoria Bella,
be required to specifically perform an alleged contract for
an exchange of real estate and personal property. On the
filing of the bill a temporary injunction therein prayed for
was ordered by the judge upon the complainants giving a
bond in the sum of \$1000, restraining the defendants from
disposing of the real estate described in the bill or a prom-
issory note of the complainants alleged to have been given
in compliance with the contract. The defendants filed a
paper called a demurrer and answer, in which they set forth
that the bill did not state a cause of action entitling the
complainants to relief; that it appeared on the face of the
bill that it was doubtful, uncertain and inconsistent, and this

was followed by an answer denying *seriatim* each averment of fact contained in the bill, and averring in conclusion that the complainants were indebted to the defendants in a large sum of money loaned to them. A replication to the answer was filed and the cause was at issue on the facts stated in the bill. The defendants filed a motion to dissolve the temporary injunction, alleging as grounds of the motion that there was no equity on the face of the bill; that the material allegations of the bill were denied by the answer, and that the complainants were non-residents and no security for costs had been given, and the bill was uncertain and appeared to be an action at law rather than in chancery. The court, on hearing the motion to dissolve the temporary injunction, dismissed the bill and the complainants appealed to the Appellate Court for the Fourth District. That court transferred the cause to this court.

The bill prayed for the specific performance of an alleged contract, and the temporary injunction until the cause could be heard was merely collateral to the object of the bill. It is not error to dismiss a bill which seeks no other relief than an injunction, if the bill is incapable of amendment and no relief prayed for can be granted; and this may be done even though an answer has been filed. (*Goddard v. Chicago and Northwestern Railway Co.* 202 Ill. 362.) If an injunction is not the only relief sought for and is merely collateral, it is error to dismiss the bill on a finding that the complainant is not entitled to an injunction. *Hummert v. Schwab*, 54 Ill. 142; *Brockway v. Rowley*, 66 id. 99.

The court in the decree stated that the motion to dissolve the temporary injunction was treated by the court as a demurrer to the bill, but if it should be considered proper to do that the bill could not be dismissed, because the objection made was not one that could not be cured by amendment. The argument in support of the decree is, that while the bill stated a contract for an exchange of property, to

which no objection is made, it alleged that the agreement was in writing and the copy of the alleged agreement attached and marked exhibit A was uncertain, indefinite and insufficient, not setting forth the real estate by proper description or corresponding with the averments of the bill. Specific performance is a familiar ground of equity jurisdiction, and the only question would be whether the averments of the bill were sufficient to justify the relief prayed for. It is not claimed that the court erred in dissolving the injunction and there is no argument on the question of the sufficiency of the bill, but there is no doubt that if insufficient the defect could be supplied by amendment.

The court erred in dismissing the bill, and the decree is reversed and the cause remanded.

Reversed and remanded.

(No. 14580.—Reversed and remanded.)

THE SPRINGFIELD DISTRICT COAL MINING COMPANY, Plaintiff in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.*—
(JOHN JACKSON, Defendant in Error.)

Opinion filed June 21, 1922.

1. WORKMEN'S COMPENSATION—*when employee having a pre-existing disease is not entitled to compensation for injury.* Although an employee suffers from a pre-existing disease, an injury may be said to arise out of the employment if the pre-existing condition is accelerated in a material degree by the accident or injury, and the employee will be entitled to an award notwithstanding the disease, but he is not entitled to compensation for a condition resulting from a pre-existing disease and not from the injury.

2. SAME—*the Supreme Court is governed by law in force when judgment is entered below.* The Supreme Court, in reviewing a compensation case, is governed by the law in force at the time of the entry of judgment in the circuit court.

3. SAME—*decision of Industrial Commission must be based upon facts.* The decision of the Industrial Commission must be based upon facts in evidence and cannot rest upon conjecture and surmise.

WRIT OF ERROR to the Circuit Court of Sangamon county; the Hon. E. S. SMITH, Judge, presiding.

T. W. QUINLAN, for plaintiff in error.

KERR, MACDONALD & MURPHY, for defendant in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

John Jackson, the applicant, filed a claim before the Industrial Commission for compensation on account of an injury sustained while working for plaintiff in error in the line of his employment. The matter was referred to an arbitrator, who found on June 4, 1919, that the applicant was not entitled to recovery under the Workmen's Compensation act. On appeal to the Industrial Commission, that body, on hearing, entered an order March 10, 1920, awarding applicant \$9.76 a week for 358 weeks and \$5.92 for one week and thereafter a pension for life of \$23.33 a month, also awarding \$30 for medical aid. That finding of the Industrial Commission was taken to the circuit court, and on March 1, 1921, the finding was reversed and the cause remanded to the commission, and the remanding order was filed with the commission April 11, 1921, the circuit court holding that the award of the commission was excessive and that the finding of total disability is not sustained by the evidence. On a rehearing before the commission additional evidence was taken, and the commission found on June 23, 1921, that the applicant should recover \$6.76 per week for 416 weeks for partial disability. This second finding was taken to the circuit court of Sangamon county December 23, 1921, by *certiorari*, and the award of the commission was affirmed, and the cause has been brought here by writ of error for review.

Jackson, the applicant, was fifty-six years of age at the date of the alleged accident, and had been working, off and on, for years as a miner for the plaintiff in error. It is conceded that on September 18, 1918, the relation of em-

ployer and employee existed, that the applicant's earnings for the preceding year were \$1015.26, and that both parties were subject to the provisions of the Workmen's Compensation act. The applicant claimed that he was injured on September 18, 1918, by being overcome with bad air and that he received a complete permanent disability therefrom. The evidence seems to show clearly that on the day in question the applicant was compelled by physical disability to leave the mine of plaintiff in error where he was working, and one of the important questions to be decided is whether or not this physical disability was caused by breathing bad air in the mine or whether his physical condition on that day was caused by former disabilities, some of which were, in their nature, organic.

There was evidence offered by the applicant himself, and by other witnesses, to the effect that the ventilation in the room of the mine where the applicant worked was very poor on September 18, 1918; that there was no cross-cut in that room and that the air was thereby rendered foul. There was considerable testimony on the part of the coal company that there was a cross-cut through the room at the time in question which furnished sufficient fresh air for the miners working in that room or adjacent thereto. The applicant testified that he was overcome in the room by bad air, which was caused by a blue kind of gas or smoke in the room, which choked him; that he went for a drink of water; that he then got his shovel and started to work again and the gas caught him; that he began to get weaker and sat down in the middle of the track, becoming unconscious; that when he came to his senses he was nervous, had a headache, and his eyes felt as if they would pop out; that he succeeded in getting to the opening in the mine; that on the way he passed the face boss and told him the air had caught him and that he could not do anything; that at the bottom of the shaft he met the bottom boss and told him he was sick and wanted to go to the top; that he went

home and sent for Dr. McMahon, who had previously treated him. The applicant testified that he had been in fairly good physical condition before September 18, 1918, but had never been well since that date, and that his physical condition was caused by the bad air in the mine on that date; that a few days after he went back to the mine and tried to work but could not stay.

Dr. McMahon, who treated Jackson, testified that the applicant had bronchial asthma and a sympathetic heart affection with it; that this affection is sometimes called miner's asthma; that when he was called on September 18, 1918, it was his opinion that the applicant had been affected by bad air, which brought about the acute physical condition that he was in on that day; that the bad air of the mine had affected his bronchial trouble and aggravated his heart trouble, but that this would not have rendered his physical condition permanent. The doctor testified also that previous to September 18, 1918, he had treated the applicant and found him in a condition somewhat similar to that he was in on September 18; that miner's asthma was a progressive disease and the condition would become more acute; that the bad air would cause the bronchial tubes to tighten up and that the heart would beat faster and that the applicant could not talk above a whisper. As we understand the testimony of Dr. McMahon, he had treated Jackson when in a similar condition before September 18, 1918, and considered his physical condition of long standing, which was aggravated on the day in question by the bad air in the mine.

Dr. Ware was called in by the applicant to treat him in October, 1918, and testified that he found his bronchial tubes affected and that his heart had a valvular insufficiency; that the heart condition was organic; that the condition of the bronchial tubes and heart looked as if it were of some little standing.

Dr. Lockwood was called as an expert by plaintiff in error and was asked a hypothetical question presenting the facts as to the applicant's condition, and testified, in effect, that he did not think that that condition was caused by gas or bad air in the mine, and that a man in that condition who became sick in a mine would be nauseated and obliged to leave the mine because of gas or bad air but that such gas or bad air would not produce a permanent disability, although it might aggravate the symptoms and cause him to be temporarily unable to work.

On the second hearing before the Industrial Commission Dr. Deal testified that he had examined the applicant on April 6, 1921, and found a man rather robust, rather fat for his height, and about sixty years old; that he gave a history of becoming dizzy in the mine in 1918; that he walked to the bottom and got into the fresh air but felt no better; that on going home he was confined to his bed for a little time and then came to Springfield the second day, and has been up and around ever since but is unable to work except at light work; that from witness' observation and the history of the case it was his opinion that the applicant had emphysema of the chest; that he had a heart murmur and a blood pressure of 175; that an X-ray examination showed that he had aneurism of the aorta; that the enlarged aorta, the heart murmur and the emphysema were all organic conditions that would not be caused by applicant coming in contact with black damp in the mine; that these organic conditions would affect his ability to work and would cause symptoms as applicant stated, and also might cause him to lose his voice by the pressure of the aneurism on the nerve; that he did not believe that the applicant's condition at the time witness examined him in April was caused by the bad air or gas in the mine; that his condition was organic, which had lasted for a long time.

Under the decisions, whatever the pre-existing physical condition of the applicant may be, if an accident or condi-

tion of the employment is the immediate occasion of the injury it will be held that the injury arose out of the employment because it develops within it; that when the exertion or condition of the employment acts upon the weakened condition of the body of the employee or upon an employee predisposed to suffer injury, in such a way that a personal injury results, the injury must be said to arise out of the employment if the pre-existing condition is accelerated in a material degree by the accident or condition. (*Big Muddy Coal Co. v. Industrial Board*, 279 Ill. 235.) It has long been held that an employee is entitled, under the Workmen's Compensation act, to be compensated for every accidental injury suffered in the course of his employment and arising out of the same; that the measure and limit of his right is that the injury sustained is the proximate cause of the incapacity for which compensation is sought; that the previous physical condition of the employee is unimportant, and he may recover for permanent incapacity which results from an accident independently of pre-existing disease but is not entitled to compensation for a condition resulting from a pre-existing disease and not from an injury suffered in the course of the employment and arising out of it; that if there is a pre-existing disease the employee is entitled to recover for all the consequences attributable to the injury by the acceleration or aggravation of such disease; that such aggravation or acceleration, permanent and progressive in its nature, would entitle the employee to compensation to the extent and in the proportion in which the pre-existing disease is increased or aggravated. (*Springfield District Coal Co. v. Industrial Com.* 300 Ill. 28.) The evidence in the record, other than that given by the applicant, most clearly shows a pre-existing disease which the applicant had for some time prior to September 18, 1918, and while the testimony of the applicant himself is not in entire harmony as to his physical disability before September 18, his testimony, taken in connection with the other

testimony in the record, in our judgment shows, practically beyond controversy, that he did have a pre-existing disease as to the bronchial tubes and heart prior to that date which might have been aggravated by bad air in the mine to which he was exposed on that date, but that the effects of bad air which he may have breathed on September 18 would not be so permanent that his physical condition at the time of the second hearing before the Industrial Commission could properly be held to have been caused by this bad air to which he was subjected on the date in question.

On a hearing on the writ of error in this court it must be held that the court is governed by the law in force at the time of the entry of judgment in the circuit court. The most that can be said from this record is that the bad air to which applicant testified he was subjected in the mine on September 18, 1918, might have aggravated his pre-existing physical condition so as to entitle him to compensation for a temporary disability, but the evidence furnishes no basis for finding to what extent the bad air contributed to the applicant's incapacity or the relative proportions which the pre-existing disease and bad air contributed to the cause of his physical incapacity. The conclusion from the record as to the percentage of the incapacity which existed because of the bad air is entirely speculative. It has been frequently said by this court that the decision of the Industrial Commission must be based upon facts in evidence and cannot rest upon conjecture and surmise. (*St. Louis Smelting Co. v. Industrial Com.* 298 Ill. 272; *Hafer Washed Coal Co. v. Industrial Com.* 293 id. 425; *Edelweiss Gardens v. Industrial Com.* 290 id. 459.) The possibility of the bad air being the cause of the applicant's condition at the time of the finding is not sufficient to justify such a finding as was made by the Industrial Commission and affirmed by the circuit court.

For the above reason the judgment of the circuit court will be reversed and the cause remanded to that court, with

directions to remand the cause to the Industrial Commission for a determination of the right to compensation, and for a further hearing, if desired by either party, on the question as to the proportion of applicant's physical incapacity caused by his being subjected to the bad air or gas in the mine, and for such further proceedings as may be authorized by law.

Reversed and remanded, with directions.

(No. 14623.—Decree affirmed.)

ROYAL E. KNAPP, Appellant, vs. EMMA KNAPP, Appellee.

Opinion filed June 21, 1922.

1. DOWER—*dower is not a debt or claim against husband or his estate.* The right to dower is not a debt or claim against the husband in his lifetime or against his estate after his death, but it is a right which the law gives the widow in lands of which the husband was seized during marriage, and is inchoate during the husband's lifetime.

2. DIVORCE—*wife's agreement to release husband from all liabilities does not bar dower.* A wife's agreement on securing a divorce from her husband to release him "from all present and future liabilities for any debts, necessities, attorneys' fees or *anything else*" will be construed as relating only to personal obligations of the husband and not as barring the wife's inchoate right of dower in lands not described in the agreement.

3. SAME—*when divorce does not bar dower.* A wife who secures a divorce for the husband's fault does not thereby lose her dower right in his lands.

APPEAL from the Circuit Court of Livingston county;
the Hon. S. R. BAKER, Judge, presiding.

ADSIT & THOMPSON, for appellant.

TUESBURG, WILSON & ARMSTRONG, for appellee.

Mr. JUSTICE STONE delivered the opinion of the court:

The appellant filed his bill in equity in the circuit court of Livingston county against the appellee, his former wife, for the purpose of compelling her to release her interest in certain Illinois real estate, or, in the alternative, to cancel her inchoate right of dower in said real estate as a cloud upon his title. The chancellor sustained a demurrer to the bill and dismissed the same for want of equity. The cause is now before this court on appeal to review the decree dismissing the bill.

The appellee was divorced from appellant by decree of the circuit court of Livingston county on May 17, 1911, on the ground of desertion. At that time the appellant was the owner of certain real estate and personal property. While the bill for divorce was pending and prior to the entering of the decree therein, appellant and appellee entered into a certain agreement, which was reduced to writing and is set forth in the bill of complaint and constitutes the sole ground upon which the appellant bases his right to relief in equity. In this agreement the appellant agrees to deed to Arthur N. Pearson, a brother of the appellee, certain lands then owned by the appellant, subject to a certain mortgage of \$7680 described in the agreement, and further subject to a certain lease and the rights of the tenant in possession thereunder, reserving unto the appellant the right to sell and dispose of the crops and out of the proceeds pay the interest on the mortgage debt and a tax installment due May 1, 1911. The balance of the proceeds of the sale of the crops was to be paid to the appellee. Appellant also agreed to furnish and deliver to the appellee a certain abstract of title to the lands showing merchantable title on the date of the delivery of the deed. He also agreed to give to her his promissory note for \$3500, dated January 11, 1911, due March 1, 1914, and to pay her on the execution of the contract the sum of \$225. All the above

was in consideration of her promises and was to be performed in the event she secured a divorce from him. Appellee's agreement was "to release the said Royal E. Knapp from all present and future liabilities for any debts, necessities, attorneys' fees or anything else." It was further agreed that the appellant should deposit the contract and his deed in question with the National Bank of Pontiac, also his promissory note above described and a certain other note on which the appellee was security; to release the appellee from any liability for the support of the mother of appellant under a certain contract signed by her, and to deliver to the bank the lease above described, properly assigned to the appellee. The appellee agreed to deposit with the bank a receipt in full releasing the appellant from all liability for accounts and attorneys' fees and from any liability for alimony. The appellant and appellee further agreed that the bank should hold the papers in escrow, and in case a divorce was secured to deliver them to the respective parties according to the terms of the agreement, and in case no divorce was granted, to re-deliver the papers to the parties from whom they came. The bill avers that the contract and all of appellant's papers above described were delivered to the bank; that the appellee secured a divorce and that the bank delivered all of the papers in accordance with the stipulations in the contract. It further avers that the appellant is advised by counsel that the inchoate right of dower of the appellee in the real estate undisposed of by the above contract is not released, and that upon demand she refuses to release the same.

It is contended by the appellant that he is entitled to a release from the appellee of her inchoate right of dower in the lands not disposed of by the contract, under the terms and conditions thereof. It is contended by appellee that the contract does not provide for a release of her inchoate dower right in the lands in question; that the contract is void on grounds of public policy, and for that reason the

courts will leave the parties thereto where it finds them. It is necessary to consider the first, only, of these objections.

The right to dower is a right which the law gives to the widow in the lands of which her husband was seized during marriage. It is inchoate during the life of the husband. It is not a debt or claim against the husband in his lifetime or against his estate after his death. A fair construction of this contract is, that the appellee only agreed to release her husband from obligations personal to him which the law imposes upon him because of the marriage relation. He owed her the duty of maintenance and support. In case of divorce secured by the wife there arises a personal obligation to pay alimony to her. Other personal obligations in this contract, within the intent of the parties, were her attorney fees, her liability to pay a certain note which she had signed as security, and a certain contract which she had signed with her husband agreeing to care for and support his mother. The wife who secures a divorce for the husband's fault does not thereby lose her dower right in his lands. It is clear from the contract and the averments in the bill that the personal obligations referred to were all the parties intended to cover by the contract.

It is contended by the appellant that the words "anything else," in the contract, are sufficient to include the appellee's inchoate right of dower. We do not believe that the language of the contract is susceptible of that construction. The instrument relates only to personal obligations and does not mention interest in lands not described therein. Its language is plain and unambiguous, and while appellant may have desired to have his lands released of the appellee's inchoate right of dower such release was not included in the contract, and this court cannot read into the contract a provision which it does not contain.

The decree of the circuit court will be affirmed.

Decree affirmed.

(No. 14677.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. FRANK DILLON, Plaintiff in Error.

Opinion filed June 21, 1922.

CRIMINAL LAW—the Parole law is valid. The Parole law does not violate the provisions of either the State or Federal constitution. (*People v. Connors*, 291 Ill. 614, and *People v. Simmons*, 299 id. 201, followed.)

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. KICKHAM SCANLAN, Judge, presiding.

WILLIAM L. SULLIVAN, and CHARLES P. R. MACAULAY,
for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, ROBERT E. CROWE, State's Attorney, and EDWARD C. FITCH, (EDWARD E. WILSON, CLYDE C. FISHER, and ALVA L. BATES, of counsel,) for the People.

Mr. CHIEF JUSTICE THOMPSON delivered the opinion of the court:

Plaintiff in error pleaded guilty to an indictment charging robbery and was sentenced to the penitentiary in accordance with the provisions of the Parole law. His sole contention in this court is that the Parole law contravenes certain provisions of the State and Federal constitutions. This contention has been answered in earlier decisions, (*People v. Connors*, 291 Ill. 614; *People v. Simmons*, 299 id. 201;) and so the judgment of the criminal court is accordingly affirmed.

Judgment affirmed.

(No. 14570.—Reversed and remanded.)

THE CHICAGO, WILMINGTON AND FRANKLIN COAL COMPANY, Defendant in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.*—(VICTOR MATHIAS, Plaintiff in Error.)

Opinion filed June 21, 1922.

1. WORKMEN'S COMPENSATION—*dependency is a question of fact for the Industrial Commission.* Dependency, and the extent thereof, are questions of fact for the Industrial Commission, and the courts will not interfere when such facts are controverted, unless it can be said that the finding of the commission is against the manifest weight of the evidence.

2. SAME—*what is test for determining dependency.* The test for determining dependency is whether the contributions of the deceased were relied upon by the dependent for his means of living as determined by his position in life, or whether the dependent was to a substantial degree supported by the employee at the time of the employee's death.

3. SAME—*when a child contributes to support of parents.* A child contributes to the support of its parents, within the meaning of the Compensation act, when it contributes a substantial sum to the support of the family although the child is a minor and the sum contributed is less than the actual cost of his support.

4. SAME—*when father is a dependent of minor son.* A father may be regarded as a dependent of his deceased son, who was eighteen years old, where the father was unable to work because of ill-health and the son contributed a substantial portion of his earnings to the support of the father as well as the entire family.

5. SAME—*when injury arises out of and in course of employment.* An injury which can be seen to have been a natural incident of the work or a natural result from the nature of the employment may be said to arise out of the employment, and an injury happens in the course of the employment if it occurs while the employee is doing what he may reasonably be expected to do during the time he is employed and at a place where he may reasonably be during such employment.

6. SAME—*whether employee was violating rule is a question of fact.* Whether the act of the employee at the time of the injury was contrary to his employer's rules or in accordance with a custom acquiesced in by the employer or at the direction of the employer is a question of fact for the Industrial Commission, and its finding will not be set aside by the courts, where the facts are controverted, unless against the manifest weight of the evidence.

7. SAME—*when violation of rules will not bar compensation.* Where it is proved to have been the custom in a mine to recruit its drivers from the trappers, compensation for an injury to a trapper while driving one of the cars during the noon hour at the request of one of the drivers is not barred by violation of a rule prohibiting trappers from driving cars, where it is also shown that the trapper had about completed his apprenticeship as a driver and was next in line for promotion to that position.

WRIT OF ERROR to the Circuit Court of Macoupin county; the Hon. FRANK W. BURTON, Judge, presiding.

KERR, MACDONALD & MURPHY, for plaintiff in error.

JOHN J. SHERLOCK, and TRUMAN A. SNELL, for defendant in error.

Mr. JUSTICE STONE delivered the opinion of the court:

Frank Mathias, son of the plaintiff in error, was injured while working in the mine of the defendant in error on the 28th day of September, 1920, and on that date died as the result of such injury. The deceased and defendant in error were working under the Workmen's Compensation act of this State and subject to its provisions. A hearing was had before the arbitrator and an award entered in favor of the plaintiff in error for \$7 per week for a period of 235 weeks, or a total of \$1650, being the minimum under paragraph (c) of section 7 of said act. This award was sustained on review by the Industrial Commission. The circuit court of Macoupin county set aside the award.

Two questions are presented by the assignment of errors for review by this court: First, dependency; and second, did the accident arise out of and in the course of the employment of the deceased.

As to the question of dependency, the evidence in the record shows that the deceased was eighteen years of age on April 18, 1920; that the petitioner is the father of the deceased and at the time of the accident in question had

nine children living at home; that the oldest boy, Steve, was working in the mine of the defendant in error and became twenty-one years of age on August 21, 1920; that no other members of the family were old enough to work and none of them were working; that the petitioner, until May, 1920, worked in the mine of the defendant in error, but on account of sickness and inability to work had not worked since that time; that Steve, at the time of the accident, had taken the place of the plaintiff in error in the mine; that after becoming of age Steve paid \$48 per month to his mother for board; that the father earned prior to May, 1920, when the mine worked practically full time, about \$200 per month and in slack time about \$90 per month; that Steve, after becoming of age, earned practically the same amount as the father; that the deceased son, when the mine was working full time, had an earning capacity of about \$60 per month; that the entire family expense was approximately \$200 per month; that the living expenses of the father and mother, without the children, would be in the neighborhood of \$75 per month; that after Steve became of age he collected his own wages and spent the same for his own use except the \$48 above stated, and that the deceased son lived at home with his father and mother and contributed in the neighborhood of \$60 a month to the use and support of the family. Plaintiff in error, at the time of the death of Frank, was receiving about \$108 per month from the two boys.

Dependency, and the extent thereof, are questions of fact for the Industrial Commission, and the courts will not interfere when such facts are controverted, unless it can be said that the finding of the commission is against the manifest weight of the evidence. (*Otis Elevator Co. v. Industrial Com.* 302 Ill. 90; *Keller v. Industrial Com.* id. 610.) The test for determining dependency is whether the contributions of the deceased were relied upon by the dependent for his means of living as determined by his position

in life, or whether dependent was to a substantial degree supported by the employee at the time of the employee's death. (*Pratt Co. v. Industrial Com.* 293 Ill. 367.) A child contributes to the support of its parents, within the meaning of the Compensation act, when it contributes a substantial sum to the support of the family, although this sum is less than the actual cost of its support and maintenance where the child is a minor or is in a condition to demand legal support from its parent. (*Richardson Sand Co. v. Industrial Com.* 296 Ill. 335.) The uncontradicted evidence in this case shows that in May prior to the accident in question the father had ceased working in the mine or at any other employment on account of poor health, and that at the time of the accident the oldest son, Steve, had become twenty-one years of age and had taken his father's place in the mine, and that the deceased had contributed a substantial portion of his earnings to the support of the father as well as of the entire family. Under the tests laid down by this court the plaintiff in error was a dependent within the terms of the Compensation act.

As to the question whether or not the accident arose out of and in the course of employment, the evidence shows that the deceased was employed by the defendant in error as a trapper, whose duties are to open doors for drivers, kick latches for them, and give signals when it is safe for the driver to come ahead or warning to stop when it is unsafe for the driver to approach the door or station at which the trapper stays; that at the noon hour on the day of the accident Johnny Trojeck, a driver, asked the deceased to take the mule of another driver and go into the mine and bring some cars of coal from a place beyond the door where the deceased was trapping; that this was during the dinner hour and before the whistle had blown to go to work; that the deceased brought one car of coal to the parting and then went back for the second, all of which were cars in Trojeck's run; that while bringing this second car to the

parting the deceased lost control of the same and was thrown off and severely injured, from which injury he soon died. The testimony further shows that there was a custom in this mine to recruit the drivers of the cars drawn by mules that were used in hauling coal from the working face to the bottom of the mine from among the trappers, who learned to drive by making extra trips for the drivers; that after a trapper had driven as an extra driver he was then employed as a driver; that the deceased was one of the older trappers in the mine and had been driving for other drivers a few days a week for a period of three months previous to his death, and he had been authorized by the driver-boss, on at least one occasion, to act as an extra driver and had been paid as an extra driver for one shift; that other drivers then in the mine had acquired their previous experience in this way; that this custom or method of acquiring experience so as to be selected as a driver was acquiesced in by the officers of the mine and was known to exist by the driver-boss. On this occasion, however, the particular act done by the deceased was not authorized by the driver-boss nor was it done to his knowledge. It was done solely at the request of another driver.

An injury which can be seen to have been a natural incident of the work and to have been contemplated by a reasonable person as a result of the exposure occasioned by the nature of the employment may be said to arise out of the employment. (*Edelweiss Gardens v. Industrial Com.* 290 Ill. 459.) An accident happens in the course of employment if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing. (*Weis Paper Mill Co. v. Industrial Com.* 293 Ill. 284.) Whether or not the defendant in error or its agents in charge of the work knew of the practice of trappers to acquire their training as drivers by occasionally driving for other driv-

ers or driving on extra trips at the direction of the driver-boss being a controverted question of fact for the Industrial Commission, its finding in that respect will not be set aside by the courts unless against the manifest weight of the evidence. *Keller v. Industrial Com. supra.*

There is some testimony in the record tending to show caution and warnings by the driver-boss that certain trappers should not be permitted to drive. This, however, seems to have been confined to the newly employed trappers and not to those who had been trapping for the length of time that the deceased had been employed. There was also some evidence brought out on cross-examination that there was in this mine, at the time of the accident, some rule of employment governing the conduct of trappers when acting as drivers. The defendant in error, however, produced no testimony from the officers in charge of the mine as to this rule or its provisions. The most that can be said of it is, that as to newly employed trappers greater caution should be observed than as to the older ones; that as the time of employment lengthened a greater freedom existed as to the method of obtaining experience which would qualify a trapper to become a driver. The deceased was one of the first in line to be employed as a driver had not the fatal accident occurred.

While this accident occurred during the noon hour, when the mine was not in operation, nevertheless it was an act which the deceased might reasonably be expected to do at that time and in that place in order to acquire experience which would qualify him to be employed as a driver. To perform the act in question at the time and place would be less hazardous and less likely to result as it did than had he attempted to do the same act when the mine was in operation, and at this particular time he could leave his post of duty at the door and perform this act without violating his duty as a trapper. While it was done at the request of another driver, nevertheless it was in the

nature of an act which might reasonably be expected of an apprentice or one endeavoring to learn to do another act of greater skill and thereby acquire promotion. When a custom exists, as shown here, to recruit drivers from trappers, and a rule prohibiting trappers driving—if there was such a rule—is not observed, and the officials of the company know of such failure to observe the same, violation of the rule does not bar compensation. (*Sesser Coal Co. v. Industrial Com.* 296 Ill. 11.) The evidence shows that the deceased had at times been paid extra for driving. This also would indicate knowledge and acquiescence on the part of his employer.

For the foregoing reasons the judgment of the circuit court is reversed and the cause remanded, with directions to quash the writ and confirm the award.

Reversed and remanded, with directions.

(No. 14558.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. JOE SECCO *et al.* Plaintiffs in Error.

Opinion filed June 21, 1922.

1. CRIMINAL LAW—*when objections to selection of grand and petit juries cannot be considered.* Objections to the selection of the grand and petit juries which do not appear from an inspection of the common law record cannot be considered by the Supreme Court where there is no bill of exceptions.

2. SAME—*when judgment and sentence for robbery are sufficient.* A judgment of conviction for robbery is sufficient which sets out the verdict *in hac verba*, recites the overruling of motions for new trial and in arrest of judgment, and sentences the defendants to the penitentiary "for a term of years not less than the minimum term of years or greater than the maximum term of years as provided by law and until discharged by due process of law," as the Parole act applies to the crime of robbery and the penalty is fixed by statute.

WRIT OF ERROR to the Circuit Court of Franklin county;
the Hon. CHARLES H. MILLER, Judge, presiding.

OTTO CHRISTENSEN, for plaintiffs in error.

EDWARD J. BRUNDAGE, Attorney General, ROY C. MARTIN, State's Attorney, and EDWARD C. FITCH, (THOMAS J. LAYMAN, of counsel,) for the People.

Mr. JUSTICE CARTER delivered the opinion of the court:

Plaintiffs in error were indicted, tried and convicted in the circuit court of Franklin county for robbery and judgment was entered on the verdict. This writ of error is sued out to review the common law record of the trial court.

No bill of exceptions is presented, and apparently one was not preserved, as to the hearing in the trial court.

It is contended that the trial court erred in selecting the special grand jury which returned the indictment and in selecting the petit jury which tried the case. The objections as to the selection of both grand and petit juries are such as can be made to appear only by evidence which cannot become a part of the record unless it be made so by bill of exceptions. (*Earll v. People*, 73 Ill. 329; *Roberts v. Fahs*, 36 id. 268; *People v. Strauch*, 247 id. 220.) No error is shown in the common law record, and there being no bill of exceptions in the record the objections of plaintiffs in error as to the selection of grand and petit juries are not presented by the record before us. If these questions had been properly raised by the bill of exceptions, it seems clear that under the holding of this court in *Empson v. People*, 78 Ill. 248, *White v. People*, 81 id. 333, and *Mackin v. People*, 115 id. 312, it could not be held that there was any error in the method of selecting the grand jury. Neither could it be held that there was any reversible error committed by the trial court in the method of selecting the petit jury in this case, under the rulings of this court in *Siebert v. People*, 143 Ill. 571, and *Marzen v. People*, 190 id. 81.

It is further argued by counsel for plaintiffs in error that the sentence and judgment of the court are erroneous

and not sufficient and should be reversed as contrary to law. An examination of the record will disclose that the judgment, after reciting all the different steps of the trial, set out *in hac verba* the verdict of the jury, which found the defendants guilty of robbery, each having a confederate present armed with a dangerous weapon to aid and abet each of them. The judgment then recites the overruling of the motion for a new trial and the motion in arrest of judgment and proceeds as follows: "Whereupon judgment is by the court rendered upon the verdict of the jury, and defendants, Joe Secco, alias Pete Secco, and Henry Bocabella, alias Harry Bracca, are hereby sentenced to the Southern Illinois penitentiary, at Menard, Illinois, for a term of years not less than the minimum term of years or greater than the maximum term of years as provided by law and until discharged by due process of law." Robbery is a criminal offense which comes within the provisions of the Parole law of this State, and the penalty as fixed by the law for the crime of robbery in the manner in which these defendants were found guilty is fixed by the statute. Considering the whole record before us, it must be held, under the reasoning of this court in *Hoch v. People*, 219 Ill. 265, that the judgment was legal and valid. The record shows here, as it did in the case just referred to, that there was a sentence upon the verdict, and if it was necessary that the court approve the verdict, it was done by overruling the motion for a new trial. The verdict in this case determines the character of the crime and the penalty, and the sentence upon the verdict is an adjudication by the court and is sufficient as a judgment.

We find no reversible error in the record, and the judgment of the circuit court of Franklin county will be affirmed.

Judgment affirmed.

(No. 14213.—Judgment affirmed.)

MARY BECK *et al.* Appellants, *vs.* LEAH M. LASH *et al.*
Appellees.

Opinion filed June 21, 1922—Rehearing denied October 4, 1922.

1. WILLS—*order denying probate and which is set aside as to insane defendant need not be set aside as to others.* The fact that an order denying probate of a will is set aside on the petition of an insane party because no guardian *ad litem* was appointed to defend her is not sufficient ground for setting aside the order for fraud as to other parties.

2. SAME—*failure of an executrix to appeal from an order denying probate is not ground for setting aside the order.* Failure of an executrix to appeal from an order of the county court denying probate of the will is not of itself sufficient ground for setting aside the order at the petition of parties who were interested in the will, notwithstanding the fact that the trial, on appeal to the circuit court, is a trial *de novo*, in which the proponent is allowed to introduce any testimony competent to establish the will in chancery.

3. SAME—*parties interested in will should appeal from order denying probate—laches.* Where the county court has jurisdiction of the parties and subject matter of a proceeding to probate a will it is the duty of parties interested in the will to ascertain the result of the court's holding, and if they fail to do so and do not appeal from the order denying probate, they cannot, several years afterward, petition the court to set aside the order, as their *laches* is a complete bar to such petition.

4. JUDGMENTS AND DECREES—*when judgment or decree cannot be set aside—appeal.* Where the court has jurisdiction of the subject matter and of the parties in a proceeding and hears testimony and renders its order and judgment the same is binding on all parties to the suit and can only be set aside for fraud, and where both parties have a right to appeal neither side can complain because no appeal was taken by the other side.

APPEAL from the Circuit Court of Marshall county; the Hon. JOHN M. NIEHAUS, Judge, presiding.

FRANK J. QUINN, CHARLES V. O'HERN, and BAYARD W. WRIGHT, (HAROLD R. SCHRADZKI, and CHARLES P. GREEN, of counsel,) for appellants.

HENRY M. KELLY, FRED W. POTTER, BARNES, MAGOON & BLACK, and WALLACE J. BLACK, guardian *ad litem*, for appellees.

Mr. JUSTICE DUNCAN delivered the opinion of the court :

On April 12, 1920, Pearl Lash, an insane person, by her guardian and next friend, Emma L. Olson, filed her petition in the county court of Marshall county praying the court to set aside an order entered by it September 21, 1914, denying the probate of the last will and testament of Theodore F. Lash, deceased. On July 19, 1920, Mary Beck and twenty-two others, including Emma L. Olson, who are the nieces and nephews and residuary legatees and devisees of Lash, filed their petition in the county court, by which they adopted, by reference to the same, the allegations of the petition of Pearl Lash, and also therein alleged further facts by which they, as joint petitioners with Pearl Lash, sought to set aside the order of the county court denying the probate of said will. Answers were filed to said petitions by Leah M. Lash, as administratrix of the will of Sarah C. Lash, deceased, and others who claim an interest in the property of Theodore F. Lash. On a hearing the county court dismissed the petitions as to all petitioners. An appeal was taken to the circuit court of Marshall county, and upon a trial *de novo* the circuit court granted the petition of Pearl Lash but denied all relief asked by the other petitioners and dismissed their petition. All the petitioners except Pearl Lash have perfected their appeal to this court.

The undisputed facts are the following: On August 19, 1910, Theodore F. Lash called at the office of his attorney and had his will prepared and executed, by which he devised and bequeathed all of his property, real and personal. By the provisions thereof, after directing payment of all of his debts and funeral expenses, he directed that certain legacies be paid to certain legatees therein mentioned. The main provisions of his will were to the effect

that his widow, Sarah C. Lash, should have one-half of the income of the remainder of his property for life, and that his son, Raymond R. Lash, should have the remaining one-half of such income during his life, and in case he died without leaving children prior to the death of his mother, that then she should have the entire income of such property during her life. The will also provided that in case his son should die leaving a child or children or descendants of a deceased child or children surviving him, all the remainder of his property after the death of his son and his widow should go to such child or children or descendants. The will further provided that in case of the death of said son without leaving children or descendants of children, the entire remainder of the property after the death of his son and his widow, after the payment of certain specific legacies named, was to be divided into four equal parts, one-fourth of which he devised and bequeathed to the children of his deceased brother, William, another fourth thereof he devised and bequeathed to the children of his brother David, a third fourth he devised and bequeathed to the children of his brother Charles, and the remaining fourth he devised and bequeathed to the children of his deceased sister, Laura V. Mitchell, each and all of said sets of nieces and nephews to have and to hold the remainder forever. The appellants and Pearl Lash are all the children of the three brothers and sister of the testator, who died May 25, 1914, leaving him surviving his widow, Sarah, who is named in the will as executrix, and his son, Raymond, as his only heir. The widow elected to qualify as executrix and filed the will for probate in the county court aforesaid. A petition was also filed by her, in which she made all the allegations that are required by the statute to be made for the probating of the will, and she therein stated the names and the places of residence of all of the heirs, devisees and legatees named in the will, including appellants, who were all non-residents of the State of Illinois. The record shows

that the clerk of the county court properly mailed to each of the legatees and devisees a copy of the petition, and it is not contended by any of the appellants that they did not receive a copy of the petition. On the day set for the probate of the will, which was stated in the petition, the two attesting witnesses to the testator's will appeared and testified in court, one of them testifying to the effect that he was not sufficiently acquainted with the testator to state whether he was or was not mentally competent to make a will or was of sound mind and memory at the time he executed the same, and the other attesting witness testified that the testator was not of sound mind and memory and not competent to make a will, and accordingly the court entered an order denying probate of the will. There was no appeal by the executrix or other persons from the order of the court. On October 12, 1914, she filed her petition for the appointment of herself as administratrix of the estate of Theodore F. Lash, and she was appointed, took the oath and proceeded to administer on the estate. A widow's award was set off to her in the sum of \$2750. The real estate of the deceased was of the value of \$100,000 or more and the personal estate of the value of \$2000. Raymond R. Lash died November 27, 1918, leaving no child or descendant of a child, and leaving his mother, Sarah C. Lash, and his widow, Leah, as his only heirs. Sarah died testate September 8, 1919, and her will was probated. Her legatees and devisees are appellees here.

The petition of the appellants alleged and proved the substance of the foregoing facts, and in addition thereto charged certain specific acts of fraud against the widow and Raymond, the son of the testator. These acts of fraud were, in substance, that very soon after the probate of the will was denied the executrix and Raymond informed appellants that the will was duly probated; that appellants relied on such information and believed that it was true and acted upon it, and did not learn that such information was

false until October 4, 1919, when they were advised that the will had not been probated; that Sarah fraudulently connived with Raymond to induce, and he did induce, one of the attesting witnesses to the will to decline to testify that the testator was of sound mind and memory; that the executrix did not make any effort to prove or establish the will in the county court and did not appeal from its order denying probate of the will; that she at all times knew that she could establish by the testimony of many witnesses that the will was duly executed and attested as required by law and that the testator was of sound and disposing mind and memory at the time he executed his will.

The proof in the record was confined on the part of appellants mainly to the establishing of the facts that the testator, Theodore F. Lash, was at the time the will was executed of sound mind and memory and capable of making a will; that he was a very shrewd and capable business man and by his business shrewdness and thrift had accumulated the property of which he had died seized and possessed, and that the petitioner Pearl Lash was an insane person without any sufficient mental capacity to understand or to transact business matters or to comprehend the meaning or force of any notice or information concerning her property rights. Appellees declined to introduce any testimony on this hearing, and they insist that proof of the mental capacity of the testator was immaterial and improper, and the fact that the court sustained the petition of Pearl Lash furnishes no reason for granting the petition of appellants. Appellants contend that they introduced the testimony of the competency of the testator to make a will for the purpose of proving that the executrix must, by reason of such facts, have known that the testator was competent to make a valid will and that he did make a valid will and that she would be able to make such proof in the circuit court, and that it was therefore her legal duty to have appealed to the circuit court from the order of the county

court denying the probate of the will. It is therefore argued by appellants that the executrix was guilty of such fraud by failing to appeal to the circuit court as demands the granting of the prayer of appellants' petition. They also contend that as the order of the county court was set aside as to Pearl Lash it should also have been set aside as to appellants.

The record evidence clearly shows that the county court, in the proceeding to probate the will, had jurisdiction of the subject matter of the proceeding and also of the persons of all the appellants and of all the other legatees, devisees and heirs of the testator. Appellants seem to argue that there was no jurisdiction of Pearl Lash, the insane person, who was confined in a hospital for the insane in Kansas. The testimony clearly shows that notice of the petition to probate the will was mailed to her, properly addressed, or sufficiently so that she necessarily would have received it if mailed and addressed as the proof shows. It was addressed to her at her proper post-office address, but instead of describing the institution in which she was confined as the State Hospital at Parsons, Kansas, it was described as "Feeble-Minded Institute, Parsons, Kansas;" but the testimony of the superintendent of that institution shows clearly that the letter as addressed to her would necessarily have reached her and have been delivered to her, and that she did receive mail. The only irregularity in the county court proceedings for which the circuit court set aside the order as to Pearl Lash was the fact that she was shown to be an insane person and that no guardian *ad litem* was appointed by the county court to defend her. So the county court clearly had jurisdiction of all the parties and of the subject matter of the suit, and its order denying probate of the will could only be set aside for fraud as to appellants, and the fact that the order was set aside as to the insane petitioner can have nothing to do with the question as to appellants' right to have the same set aside. (*Walker v.*

Cook, 294 Ill. 294.) There was no proof in the record that the widow or the son of the testator at any time misinformed the appellants, or any of them, as to the fact that the probate court had denied probate of the will or that either of them ever induced or tried to induce either of the attesting witnesses to refrain from testifying or to give false testimony. The proof, on the other hand, is positive that neither the widow nor the son, nor the attorney for the widow in probating the will, ever tried to get either attesting witness to refuse to testify or to give false testimony. The record shows that the widow did not like the provisions of the testator's will and that she did not want it probated, but when her attorney, who was the custodian of the will, informed her that he would have to file the will and that it was her duty to have it probated if she qualified as executrix, she apparently did all that the law required of her in the county court by filing the petition, obtaining service on the parties and by producing the witnesses who attested the will and having them examined before the court. We think, therefore, that the circuit court properly found that there was no fraud shown by appellants sufficient to set aside the order of the county court refusing to probate the will.

The most that appellants can claim for a showing of fraud in the record is the bare proof, or presumption from their showing, that the testator was competent to make a will, and that the executrix knew that if she appealed to the circuit court she could establish the will notwithstanding the testimony of the attesting witnesses. Where the probate of a will is allowed or denied by the county court, on appeal to the circuit court the trial is *de novo*, and in the circuit court the executrix is allowed to introduce any testimony, in addition to that of the attesting witnesses, competent to establish a will in chancery. (*Hill v. Kehr*, 228 Ill. 204; *In re will of Barry*, 219 id. 391; *Senn v. Gruending*, 218 id. 458.) The mere failure of the executrix to

appeal to the circuit court is not sufficient ground for setting aside the order of the county court denying probate of the will. Where the court has jurisdiction of the subject matter and of the parties in a proceeding and hears testimony and renders its order and judgment, the same is binding on all parties to the suit and can only be set aside for fraud. Where both parties have a right to appeal, as they had in this case, neither side can complain because no appeal was taken by the other side. Appellants being parties to the proceeding to probate the will and having been served with notice according to law, are conclusively presumed to have known the results of the court's decision within a reasonable time thereafter and without any further notice by the executrix or anyone else. It was their duty to ascertain the result of the court's holding and its order, and failing to do so and in failing to appeal they were guilty of such negligence in protecting their rights as to estop them from now claiming that they did not learn of the order of the probate court until years after. Their *laches* in this regard is a complete bar to their petition in this case. They were not only required to prove fraud, but were also required to show that they were diligent in taking advantage of their rights. *Evans v. Woodsworth*, 213 Ill. 404.

There are two kinds of fraud as applied to judicial proceedings: fraud in obtaining an order or decree by false testimony, and fraud which gives the court only colorable jurisdiction. It is only the latter that renders collateral attack effective or renders a decree void as to all parties affected. (*Burton v. Perry*, 146 Ill. 71; *Caswell v. Caswell*, 120 id. 377; *Evans v. Woodsworth*, *supra*.) The appellants' only remedy in the case was by appeal, and as they failed to appeal and have established no sufficient ground to attack the county court's judgment collaterally in refusing to probate the will their petition was properly denied. The testator in this case was simply unfortunate in not knowing

his friends sufficiently to select therefrom two that had manly courage enough to stand by what they had acknowledged and said in his presence, after he was dead and gone. This often happens, and attesting witnesses cannot be too severely criticised for signing such an attesting clause as appears in this will and then swearing to the contrary when they are produced as witnesses in court. Such treachery is of the vilest character, no matter what is the character and standing of the attesting witnesses in the community in which they live. It is their duty either to refuse to become attesting witnesses, or else to know the character of the statements they sign and stand by them when they are called on to testify. The attesting clause to the will is in this language: "The above and foregoing instrument * * * was, on the day of the date thereof, duly signed, sealed, published and declared by the said Theodore F. Lash as and for his last will and testament, in the presence of us, who at his request and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto. And we, and each of us, do hereby certify that we were well acquainted with the said Theodore F. Lash at the time he so signed, sealed, published and declared said instrument to be his last will and testament, knew him to be of sound and disposing mind and memory, acting freely and voluntarily and not under duress or constraint of anyone."

We are thoroughly convinced from the record that the attesting witnesses by their reckless conduct in either signing a statement they knew to be untrue or in testifying in court to a deliberate falsehood have defeated and nullified the testator's will. But there is no relief now for the appellants from their testimony or from their willful and reckless conduct, as they neglected to appeal from the order denying probate of the will.

The judgment of the circuit court is therefore affirmed.

Judgment affirmed.

(No. 14221.—Judgment affirmed.)

THE PEOPLE *ex rel.* George A. Fish, County Collector, Appellee, *vs.* JOHN R. BRADSHAW, Appellant.

Opinion filed June 21, 1922—Rehearing denied October 4, 1922.

1. DRAINAGE—*judgment confirming assessment is res judicata of every question except that of jurisdiction.* On application for judgment for a delinquent farm drainage assessment the jurisdiction of the court is the only open question, as the judgment of the county court confirming the classification of the lands is *res judicata* not only as to the matters actually determined but as to every other matter within the knowledge of the objector which might have been set up as a ground for relief or defense.

2. SAME—*objection that assessment exceeds benefits cannot be raised in proceeding to collect delinquent assessment.* Since the re-enactment in 1915 of section 27 of the Farm Drainage act, allowing the land owner an opportunity, on application to confirm the assessment, to be heard on the question whether the assessment against his lands exceeds the benefits, that question cannot be reconsidered on application for judgment and order of sale for the assessment.

3. SAME—*failure to classify lands in 40-acre tracts does not render classification void.* A classification which classifies the lands in tracts ranging from 10 to 160 acres instead of in "40-acre tracts, more or less," is irregular and subject to being set aside if a proper objection is made, but the classification is not void and the objection comes too late on application for judgment and order of sale.

APPEAL from the County Court of Sangamon county; the Hon. JOHN B. WEAVER, Judge, presiding.

REDMON, HOGAN & REDMON, and SAMPSON & GIFFIN, for appellant.

C. FRED MORTIMER, State's Attorney, W. J. MILLAR, and LESLIE J. TAYLOR, for appellee.

Mr. CHIEF JUSTICE THOMPSON delivered the opinion of the court:

Union Drainage District No. 1 of the towns of Lanesville and Illiopolis, in Sangamon county, was organized in 1880 under the original Farm Drainage act of 1879. An

open main ditch and laterals were constructed and nothing further seems to have been done until 1919, when a movement was inaugurated to revive the district and reconstruct and enlarge the drainage system. No classification of the lands of the district had been made, and in order to acquire the authority to levy an assessment upon the lands included within the district the commissioners proceeded to classify the lands in accordance with the provisions of section 21 of the Farm Drainage act. (Hurd's Stat. 1921, p. 1245.) The lands of appellant, John R. Bradshaw, concerning which this litigation arises, being the east half of the northwest quarter of section 32, township 17, north, range 2, west of the third principal meridian, were classified on the graduated scale at 30. On the date fixed for hearing objections to the classification, June 12, 1920, appellant appeared at the meeting and objected to the classification of his lands. His objections were overruled by the commissioners and an order was entered by them confirming the classification as originally made. From that order of confirmation appellant appealed to the county court in accordance with the provisions of section 24 of the act. Thereafter a trial was had at the February, 1921, term of the county court of Sangamon county, resulting in a verdict of confirmation of the classification, and a judgment was accordingly entered. Thereupon the commissioners assessed appellant's lands the sum of \$600. There was no appeal from this order of the commissioners, the assessment was not paid, and the treasurer of the district certified it to the county collector as delinquent. Thereafter appellee made application for judgment and order of sale of the 80-acre tract of land. To this application appellant interposed twenty-two written objections. Objections 15 to 22 questioned the constitutionality of various sections of the Farm Drainage act, but these objections have been abandoned. Objections 4, 5, 10, 11, 12 and 13 were stricken upon motion of appellee and the

remaining objections were overruled. Judgment was entered against the lands of appellant and he appealed.

The appellant's objections may be classified into three groups, the first group being those objections which raise the question of the validity of the order of classification, the second group questioning the method by which the commissioners spread the assessment and ascertained the amount thereof, and the third group charging that the assessment exceeds the amount of the benefits.

This proceeding is collateral to the proceedings in the county court confirming the classification of the appellant's lands, and no objections can be urged in this proceeding except such as question the jurisdiction of the court. (*Spring Creek Drainage District v. Highway Comrs.* 238 Ill. 521; *Walker v. People*, 202 id. 34.) Appellant has had his day in court on the question of the validity of the classification of his lands and has had an opportunity to raise all the questions which he desired to raise with respect to this classification. All the rights of the property owner in respect to the classification of lands within the district are fully protected by the provisions of the act, and if he neglects to avail himself of the right of redressing any wrong or of correcting any error in the classification he cannot be heard to complain at another time and in another proceeding. He cannot on application for judgment against his lands for a delinquent drainage assessment raise the question of classification. *People v. Chapman*, 127 Ill. 387; *People v. Hulin*, 237 id. 122; *People v. LeTempt*, 272 id. 586.

The objection that this classification is void because the commissioners did not classify "the lands in the district in tracts of 40 acres, more or less," is not tenable. The classification of the lands in tracts ranging in size from 10 to 160 acres was certainly irregular and was not a substantial compliance with the statute, but the classification was not void. There was a classification under the statute sufficient

for all purposes of assessment if it was not set aside in a proper proceeding. The validity of the classification could not be inquired into in this collateral proceeding. (*People v. Dyer*, 205 Ill. 575; *Trumbo v. People*, 75 id. 561.) The judgment of the county court confirming the classification of the lands of appellant is *res judicata* not only as to the matters actually determined, but as to every other matter within the knowledge of appellant which might have been set up as a ground for relief or defense.

The second and third groups of objections may be considered together, for they have to do with the single question whether the amount assessed against the lands exceeds the benefits. We have held that this question may be raised in a proceeding of this character; (*People v. Welch*, 252 Ill. 167; *People v. Whitesell*, 262 id. 387; *Lake Fork Drainage District v. Highway Comrs.* 292 id. 340;) but these decisions were all based on the proposition that the land owner had not theretofore had an opportunity to be heard on the question. All of the decisions to this effect were with respect to assessments levied during the fourteen-year period from 1901 to 1915. Prior to 1901 and subsequent to 1915 section 27 of the Farm Drainage act has afforded the land owner an opportunity to be heard on the question whether the assessment exceeds the benefits, and where the proceeding is to secure a judgment and order of sale of the lands for a delinquent assessment levied while section 27 was in force the reason for allowing the question to be raised in that proceeding no longer exists. Prior to 1901 this court held that a final judgment on the question of benefits was conclusive and that the question could not be further investigated in a proceeding of the character now before us. (*People v. Meyers*, 124 Ill. 95; *People v. Chapman*, 128 id. 496.) These decisions were rendered before section 27 was repealed in 1901, but when the section was re-enacted in 1915 in language substantially the same as that of the former act, the legislature intended, according to a

well-established rule of statutory construction, that the new section 27 should have the same construction as that theretofore given the old section. (*Kelley v. Northern Trust Co.* 190 Ill. 401; 25 R. C. L. 1075.) Appellant having had an opportunity to be heard on the question of benefits and having failed to avail himself of the opportunity is not entitled to have the question considered in this proceeding.

The judgment of the county court is affirmed.

Judgment affirmed.

(No. 14452.—Decree affirmed.)

LENA M. VAYETTE *et al.* Defendants in Error, *vs.* ADDIE B. MYERS, Plaintiff in Error.

Opinion filed June 21, 1922—Rehearing denied October 4, 1922.

1. JURISDICTION—*when entry of appearance is sufficient.* The presumption is in favor of the regularity of an entry of appearance, and an entry of appearance filed in a divorce proceeding on the day on which the bill was filed is not invalid because it was signed the day before, as it becomes an entry of appearance from the day of filing.

2. DIVORCE—*what statement in entry of appearance is not collusive.* A statement in the defendant's entry of appearance that the court, if it "shall deem the proof sufficient, may enter a decree on the bill therein in favor of the complainant," does not amount to collusion or an agreement not to defend the proceeding, where there is no evidence in the case tending to show that the defendant in any way agreed that a divorce decree should be entered but the record shows that the defendant sought to avoid such a decree and afterward filed a motion to set it aside for want of notice.

WRIT OF ERROR to the Circuit Court of Livingston county; the Hon. STEVENS R. BAKER, Judge, presiding.

TUESBURY, WILSON & ARMSTRONG, and MORSE IVES, for plaintiff in error.

ARTHUR H. SHAY, and LESTER H. STRAWN, for defendants in error.

Mr. JUSTICE STONE delivered the opinion of the court:

Clarence W. Myers, defendants in error's testate, filed his bill for divorce to the January term of the circuit court of Livingston county against the plaintiff in error. The bill was filed January 6, 1920. On the same day an entry of appearance was filed in the following language:

"I, Addie B. Myers, defendant in the above entitled cause, hereby enter my appearance therein and waive service of summons therein upon me, and agree that on the filing of said bill for divorce in said cause at the January term, A. D. 1920, of said circuit court of Livingston county, Illinois, said court may proceed instanter, or at any time convenient to the court, to a hearing in said cause, and, if the court shall deem the proof sufficient, may enter a decree on the bill therein in favor of the complainant.

"Dated at Dwight, this 5th day of January, 1920.

ADDIE B. MYERS."

The charge was adultery. The complainant's proof consisted of the evidence of himself, the wife and daughter of the co-respondent named in the bill, and a letter from the plaintiff in error to Myers dated August 9, 1919, acknowledging the acts of adultery complained of in the bill. On March 20, 1920, which was on or near the last day of the January term of court, plaintiff in error filed her motion to set aside the decree and to re-open the cause for hearing of further testimony and to permit her to appear and defend the bill. Time was extended to the May term, 1920, in which to prepare and file affidavits in support of the motion, and the cause was continued until that time. It appears, however, that no such affidavits were filed, but on May 1, 1920, plaintiff in error presented her sworn petition for permission to file an answer to the complainant's bill, which petition and answer denied in detail the acts of adultery or that the complainant conducted himself towards her as a kind and faithful husband and set up counter-charges of adultery. The petition and answer also set out that the confession used in support of the decree was obtained from

her in furtherance of a preconceived plan on the part of the complainant in the bill and that the allegations of fact therein stated were wholly untrue. It appears that the record stood in this condition until the January term, 1921, when, without securing a decision of the court concerning her petition to set aside the decree and to file an answer, she filed an amended motion to vacate the decree on the ground that the court was without jurisdiction to enter it and that she was by the terms of the decree deprived of her rights without due process of law, contrary to the constitutions of this State and of the United States; alleging that the entry of appearance in the cause was void and that she had not been served with summons in the cause and had no notice of the filing of the bill of complaint or the commencement of the suit until after the entry of the decree therein. In August, 1921, the court denied the amended motion filed by plaintiff in error on May 1, 1920, and in October, 1921, denied her motion to vacate and set aside the decree for want of jurisdiction. The contention of the plaintiff in error is that this was error, that the court had no jurisdiction over her, and that it was error to refuse to permit her to answer. Clarence W. Myers died during the pendency of this cause, and defendants in error, as his representatives, were substituted.

The facts concerning the entry of appearance, as shown by the evidence heard on the motion to vacate the decree, were, that the same was signed by plaintiff in error late in the evening of January 5, 1920, and was filed the following day, at which time the bill itself was filed. The testimony of the complainant is that he told plaintiff in error that the case was to be heard the following day, and that at the same time he delivered her a copy of the bill filed on the next day. There is no question as to the entry of appearance being signed by the plaintiff in error, and the copy of the bill filed in court on January 6 contained the

indorsement, "I have received a true copy of this bill this 5th day of January, 1920," signed, "Addie B. Myers." There is no dispute as to her having signed this receipt. This testimony, according to the abstract, appears to have been offered by the plaintiff in error on the hearing on her motion to vacate the decree for want of jurisdiction. The proof, therefore, does not sustain the averment in her affidavits in support of said motion that she had no notice of the filing of the bill of complaint nor the commencement of the suit until after the entry of the decree.

It is earnestly contended by plaintiff in error that the circuit court did not have jurisdiction over her person at the time the decree was entered. The entry of appearance was in the usual form, waiving service of summons and agreeing that the cause might be filed at the January term of court and that the court might proceed at once to the hearing of the cause, and it is contended that because no summons was issued after the bill for divorce was filed and before the entry of the decree, no notice of any kind was given to the defendant. This is a refinement of reasoning which cannot be sustained. The filing of the bill and the entry of appearance were at one and the same time. There is no showing of collusion in the entry of appearance though plaintiff in error contends that it was done in accordance with a preconceived plan on the part of complainant. She, however, does not even contend that it was agreeable to her, but claims in her motion and affidavit that she signed the entry of appearance because she could do nothing else.

The presumption is in favor of the regularity of an entry of appearance and not against it. (4 Corpus Juris, sec. 36, and cases cited.) In support of the contention that the entry of appearance in this case did not give the court jurisdiction, counsel for plaintiff in error cite *McCormack v. First Nat. Bank*, 53 Ind. 446. That was a suit upon a bill of exchange. The defendant indorsed an entry of ap-

pearance on the back of the complaint. The Indiana statute requires that such an entry of appearance shall be indorsed on the back of the summons in order to amount to the equivalent of service. It was there held that as no summons had been issued there could be no acknowledgment on the back thereof amounting to appearance. Counsel also cite *Duimo v. Arbuckle*, 166 App. Div. (N. Y.) 86. That was a suit against Arbuckle and a non-resident named Jamison, and the attorney representing Arbuckle by mistake signed a stipulation of entry of appearance for Jamison, who had never authorized any appearance. The default was set aside as to him. It is seen that these cases are not on all-fours with the case at bar. Here there is no denial that the entry of appearance was in regular form, signed by the plaintiff in error. The fact that the entry of appearance was signed the day before the filing of the bill does not affect its validity. It was filed on the day the bill was filed and was the entry of appearance from the day of filing.

Numerous cases have been decided in other jurisdictions touching questions similar to the one raised here as to the sufficiency of the entry of appearance. In *Epps & Leabow v. Buckmaster*, 104 Ga. 698, the defendant signed the following entry of appearance upon the original bill: "I hereby acknowledge due and legal notice of the filing of the within bill and hereby enter my appearance in said cause, hereby expressly waiving service of subpoena and publication." The facts showed this was signed in the office of the attorney for the plaintiffs. It was there held that this was a valid entry of appearance, the court saying that it could conceive of no more effectual way of signifying an intention to appear in a case than by the defendant filing a written statement with the record in the court to the effect that he enters his appearance; that the defendant knew that the original bill, with his appearance indorsed upon it, would be transmitted to the court.

In *Harrison v. Morton*, 87 Md. 671, the attorney for the defendant indorsed on the summons, "Enter my appearance for def'ts." The attorney being authorized to appear for the defendant in that case, it was held that this entry of appearance was sufficient.

Bowman v. Bowman, 64 Ill. 75, was a divorce case filed by John B. against Maria S. Bowman. The bill was filed November 10, 1871. On the bill was indorsed, "East St. Louis, October 24, 1871.—I hereby waive process and enter my appearance in this cause and pray an early adjudication of the case," signed "Maria S. Bowman," and this court held that there being no collusion the entry of appearance was valid and the court had jurisdiction of her person.

In *Snell v. Stanley*, 63 Ill. 391, the record showed that one of the defendants acknowledged service on the back of the summons and in that acknowledgment authorized counsel for the plaintiff to enter his appearance. It was there held that this was sufficient to constitute entry of appearance.

Plaintiff in error contends that because the entry of appearance, by its last paragraph, states that "if the court shall deem the proof sufficient, may enter a decree on the bill therein in favor of the complainant," this amounts to collusion. While it is universally the rule that an agreement not to defend a divorce case is void as against public policy and vitiates a decree entered in pursuance of such agreement, there is no evidence in this case tending to establish that she in any way agreed that a divorce decree should be entered. All the proof on her part tends to show that she did not want the complainant in the cause to secure a divorce and that she sought to avoid the same. Furthermore, this contention is inconsistent with her motion to set aside the decree for want of notice. The language in the last paragraph of the entry of appearance cannot be construed as an agreement that a divorce should be had.

It is also contended that the evidence in the case is not sufficient to warrant the decree, and that the court erred in not vacating the same on the motion of plaintiff in error in March, 1920. This contention cannot be sustained. There is abundant proof in the record of adultery on the part of the plaintiff in error and Arthur W. Lowther. The complainant testified that she admitted such infidelity to him; that she registered at the National Hotel, in Peoria, Illinois, and occupied a room with Lowther under the name of Mr. and Mrs. Morgan; that Lowther frequently visited her at her home in Dwight during her husband's absence. Mrs. Lowther, wife of the co-respondent, testified that she at different times on Sunday nights followed her husband after church services and saw him go into the house of the plaintiff in error; that on one occasion, on her being out for the evening, she returned and found the plaintiff in error in her house; that she found gray hair-pins upon her bed; that plaintiff in error's hair is gray; that she afterwards accused her husband of having intimate relations with plaintiff in error, which he admitted and told her it was none of her business. Moren Cooper Snively, daughter of Mrs. Lowther and the co-respondent, also testified to having seen Lowther go to the residence of plaintiff in error. Plaintiff in error's confession stated that she was a member of the choir in the church of which Lowther was the pastor; that their relations became intimate, and for more than a year he visited her in her apartments when she was alone and that they had illicit relations at these times.

The decree is amply sustained by the evidence. We find no error in the record in this case to warrant a reversal of the decree, and the same is affirmed.

Decree affirmed.

(No. 14517.—Reversed and remanded.)

STANLEY K. GAGE, Appellant, vs. THE CHICAGO TITLE AND TRUST COMPANY *et al.* Appellees.

Opinion filed June 21, 1922—Rehearing denied October 5, 1922.

1. PARTITION—*equity may determine legal titles involved in partition suit.* The jurisdiction conferred by a bill in chancery for partition is concurrent with that exercised by petition under the Partition act, and by section 39 of the act courts of equity may investigate and determine all questions of conflicting or controverted titles.

2. ABATEMENT—*when death of defendant abates suit in ejectment.* Although by statute a suit does not abate upon the death of the sole defendant if it might be originally prosecuted against the heir, devisee or representative, the statute contemplates that the suit be revived against the representative within a reasonable time, and where the plaintiffs in ejectment wait five or six years before having summons issued against the heir of the defendant, the right to revive the suit is lost and the court should of its own motion enter an order abating the suit.

3. SAME—*when a suit is pending.* The pendency of a suit begins with the service of process or appearance, at which time the court acquires jurisdiction, power or control of the subject matter and parties until final judgment.

4. LIMITATIONS—*when beginning of ejectment suit does not stop running of seven-year statute.* The seven-year Statute of Limitations cannot be arrested merely by the commencement of an ejectment suit which is not prosecuted to judgment in the lifetime of the sole defendant nor revived against his heirs within a reasonable time after his death.

5. SAME—*color of title under seven-year statute is presumed to have been acquired in good faith.* Color of title under the seven-year Statute of Limitations is presumed to have been acquired in good faith, and to overcome the presumption the evidence must show an intent to deceive, mislead or defraud, which would constitute bad faith.

6. SAME—*bad faith in acquiring color of title is not shown by proof of defects in the title nor actual knowledge thereof.* A party claiming title under the Statute of Limitations through color of title acquired in good faith and payment of taxes need not show that the title, if traced back to its source, is apparently legal and valid; and where the color of title is originally acquired by a tax

deed issued to the claimants' remote grantor, the fact that there were defects in the proceedings for obtaining the tax deed does not tend to show bad faith in acquiring color of title, nor is actual knowledge of such defects material on the question of good faith.

7. TAX DEEDS—*seal of county court is proper for a tax deed.* Under section 221 of the Revenue act, providing that a tax deed made by the county clerk "under the official seal of his office shall be recorded," the proper seal to be used is the seal of the county court, as being the official seal of the office of clerk of the court, rather than the seal of the county clerk, as keeper of the county records.

APPEAL from the Circuit Court of Cook county; the Hon. HUGO M. FRIEND, Judge, presiding.

ENOCH J. PRICE, for appellant.

HARRY G. HERSHENSON, (DANIEL V. GALLERY, of counsel,) for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellant, Stanley K. Gage, filed his bill of complaint in the circuit court of Cook county on August 30, 1916, alleging that he was the owner of an undivided 1/50th of a lot in Chicago particularly described in the bill, and known as lot 107, in block or division 3, of a South Shore subdivision; that the Chicago Title and Trust Company was the owner in fee of 49/50ths of the lot as trustee for Mary B. Gage; that the title was obtained under the Statute of Limitations through color of title acquired in good faith and payment of taxes; that Mary J. Gallery, Daniel V. Gallery, her husband, and William J. Onahan, claimed to have some estate, right, title or interest in the property but had no right, title or interest therein. All of these parties, and Joseph H. Larson, a tenant, were made defendants, and the prayer was that the title be declared as alleged and the premises partitioned. The

Chicago Title and Trust Company and Mary B. Gage answered, admitting all the allegations of the bill as to the respective interests of the parties. The defendants Mary J. Gallery, Daniel V. Gallery and William J. Onahan filed their plea alleging the pendency of an ejectment suit begun by them in the superior court of Cook county for the possession of the premises on June 17, 1908, in which Mary J. Gallery claimed title in fee subject to the dower of Onahan. The plea was set down for argument and was held bad and overruled. Afterward a similar plea was filed on May 19, 1917, but was withdrawn by leave of court, and on July 5, 1917, the same parties answered the bill forming an issue as to some of the facts alleged in the bill and again alleging the pendency of the ejectment suit. Exceptions to the answer so far as it set up the pendency of the ejectment suit were filed and sustained and those parts of the answer were stricken out. Onahan, who only claimed dower in the premises, died on January 12, 1919, and the suit abated as to him. The issue was referred to a master in chancery to take the evidence and report the same with his conclusions of fact and law. The master took the evidence and returned the same with his finding that the fee simple title to the real estate was as alleged in the bill of complaint, and that the defendants Mary J. and Daniel V. Gallery had no right, title or interest in the same. He recommended a decree establishing the rights of the parties accordingly, and partition. To this report Mary J. and Daniel V. Gallery filed forty-six objections, which were overruled by the master and were heard as exceptions by the chancellor. On the hearing before the chancellor two of the exceptions were sustained: First, that the complainant and his co-tenant did not have color of title made in good faith; and second, that the running of the Statute of Limitations was suspended by the pendency of the ejectment suit in the superior court during the period covered by the limitation of title proved by the complainant. The bill was

dismissed for want of equity at the complainant's costs, and he appealed.

On November 28, 1881, the county clerk of Cook county made and delivered to Asahel Gage a deed of the lot under a tax sale of September 4, 1879, and the deed was recorded in the recorder's office on November 29, 1881. On September 5, 1882, Gage and wife made and delivered to Henry H. Gage a quit-claim deed purporting to convey title to the lot. Henry H. Gage died on May 7, 1911, having devised all his real estate to his widow, Mary B. Gage. The premises had been vacant until 1899, when Henry H. Gage built a fence enclosing them, and since that time they have been enclosed and cultivated or used for pasturage by tenants of Henry H. Gage and his successors in title. On November 12, 1912, Mary B. Gage conveyed an undivided 1/50th of the lot to her son, the complainant, Stanley K. Gage, and the remaining 49/50ths to the Chicago Title and Trust Company in trust for herself. The solicitor for the complainant offered receipts for taxes and special assessments from 1877 up to the time of the hearing, but as the limitation-period claim began in 1908 the master regarded the receipts for taxes prior to that time as immaterial and admitted receipts showing payment of taxes and special assessments beginning with the general taxes of the year 1908, all of which had been paid by Henry H. Gage in his lifetime, or since his death by his successors in title. It will be seen that proof of color of title, possession and payment of taxes for the period required by section 6 of the Limitation act was complete, and the only possible question concerning color of title was whether it was acquired in good faith.

It is argued that only legal titles being involved, the remedy of the complainant was by petition for partition, in which the defendants might have had a trial by jury. The statute retains the jurisdiction in equity, and by section 39 courts of equity may investigate and determine all questions

of conflicting or controverted titles. The jurisdiction is concurrent, and the power of a court of equity embraces all claims and titles without regard to their nature. *Henrichsen v. Hodgen*, 67 Ill. 179; *Gage v. Lightburn*, 93 id. 248; *Gage v. Reid*, 104 id. 509; *Wilson v. Dresser*, 152 id. 387; *Hurlbut v. Talbot*, 273 id. 356.

The plea in abatement of this action alleging the bringing of the ejectment suit in the superior court on June 17, 1908, was set down for hearing and overruled, and by the answer to the bill the plea was waived. The claim that the Statute of Limitations was suspended by the bringing of that suit was presented as a matter of defense in the answer, but on exception that part of the answer was stricken out and there is no cross-error questioning the ruling. Notwithstanding the waiver of the plea by the answer and the elimination of the allegations on exceptions to the answer, one of the two grounds of the decree was that the Statute of Limitations was suspended by the pendency of the ejectment suit in the superior court during the period covered by the limitation title proved by the complainant. There was no merit in either. The facts alleged were, that the ejectment suit was brought by William J. Onahan and Mary J. Gallery; that they filed their declaration claiming title in fee simple in Mary J. Gallery subject to the dower of Onahan; that Henry H. Gage filed a plea of not guilty, and the suit was pending until the death of Gage, on May 7, 1911. He was the sole defendant and at common law the cause would have abated. By the statute, if a sole defendant dies before final judgment or decree the action does not on that account abate if it might be originally prosecuted against the heir, devisee, executor or administrator, but the plaintiff, petitioner or complainant may suggest such death on the record and shall by order of court have summons against such person or legal representative, after which it may proceed as if it had been originally commenced against him. The statute fixes no time for revival, but it

must be done within a reasonable time. The plaintiffs did not avail themselves of the privilege, and this suit was begun five years after the death of Henry H. Gage. Afterward, on May 18, 1917, a summons was issued against Mary B. Gage, Stanley K. Gage and the Chicago Title and Trust Company, and was returned, "The within named defendants not found in my county this June 4, 1917." The pendency of a suit begins with the service of process or appearance, when the court acquires jurisdiction, power or control of the subject matter and parties until final judgment. (*Hal-lorn v. Trum*, 125 Ill. 247; *Lyon v. Moore*, 259 id. 23.) The ejectment suit was pending from the time when Henry H. Gage was served and appeared or filed his plea, until his death, but it cannot be said that it was pending during the six years after his death, before summons was issued against the complainant, Mary B. Gage and the Chicago Title and Trust Company; and even then there was no service of process, the return showing on its face that there was no intention to serve at least one of the defendants, the Chicago Title and Trust Company. The right to revive the suit was lost, and it was the duty of the superior court of its own motion to enter an order abating the ejectment suit. *Life Association of America v. Fassett*, 102 Ill. 315.

The matter set up in the answer concerning the ejectment suit was no defense if it had not been stricken out on exception. It did not suspend the Statute of Limitations while the suit was pending against Henry H. Gage. The right to interpose the defense of the Statute of Limitations was fixed as of that date for the purpose of that suit and no other. The plaintiff in an ejectment suit asserts his title at the commencement of the suit, and if the suit is prosecuted to judgment a defense of the Statute of Limitations would only be permissible up to that time. The limitation statute has made no exception that the statute can be arrested by the commencement of a suit, and the courts have no right to make one by judicial construction. (*Mil-*

ler v. Pence, 132 Ill. 149.) Disregarding the fact that the plea of another suit pending alleged an action at law and was presented in abatement of a suit in equity, where the procedure and manner of execution were different and the judgment or relief would not be the same, and also disregarding the fact that the plea was waived by answer and exception sustained to the same matter set up in the answer, the conclusion of the chancellor was wrong.

It is contended that the tax deed was not color of title because the seal annexed was the seal of the county court, and therefore the instrument was not sealed. If the wrong seal had been used the question whether the deed would or would not be color of title is not involved, because the right seal was used. The deed was in the precise form prescribed by section 221 of the Revenue act, and it cannot be said to be defective because it followed that form, and the seal was the seal therein prescribed. The section nowhere says that the seal of the county clerk shall be used, but provides that the deed made by the county clerk under the official seal of his office shall be recorded. The county clerk occupies two offices,—one as a keeper of the county records and the other as keeper of the records of the county court,—and the seal of the court is an official seal of his office as clerk of the court. There would have been better ground for argument if the seal of the county clerk had been used instead of the seal prescribed by the statute. The proposition is quite different from the one in *McChesney v. People*, 174 Ill. 46, and *McCraney v. Glos*, 222 id. 628, where the question was whether the delinquent list was filed in the proper office, and the seal showed the filing among the county records while the statute required the list to be filed as a part of the records of the county court.

The only remaining question is whether the color of title was acquired in good faith, and the inquiry begins with the legal presumption of good faith until the contrary is shown to exist by affirmative proof. (*McConnel v. Street*, 17 Ill.

253; *Simons v. Drake*, 179 id. 62; *Dawson v. Edwards*, 189 id. 60.) To overcome the presumption the evidence must show an intent to deceive, mislead or defraud, which would constitute bad faith. It is not necessary that the title, when traced back to its source, should prove an apparently legal and valid title. (*Kruse v. Wilson*, 79 Ill. 233; *Nelson v. Davidson*, 160 id. 254; *Clayton v. Feig*, 179 id. 534.) The supposed defects all relate to the proceedings for obtaining the tax deed to Asahel Gage, while the color of title claimed was through the deed to Henry H. Gage. Whether the tax deed was good color of title or not is immaterial unless in some way it affects the question of good faith of Henry H. Gage in acquiring his title from Asahel Gage, and it is not material that Henry H. Gage may have had actual knowledge of infirmities in the title of his grantor. (*Coward v. Coward*, 148 Ill. 268; *Keppel v. Dreier*, 187 id. 298.) If the alleged defects are considered for any purpose they are not of the slightest importance as showing or tending to show bad faith. One which is typical of all is, that an affidavit made several months before the expiration of the period of redemption from the tax sale stated the time for redemption would expire on September 4, 1881, which was the date when the statutory period would come to an end, but, as a matter of fact, it would be Sunday, and under the law there would be a right to redeem on Monday, September 5. It is perfectly evident that the person making the affidavit either did not observe that September 4 would be Sunday or was ignorant of the law giving a right to redeem on the next day. To say that any intention to deceive or defraud was manifested is absurd. There were three affidavits, one by Henry H. Gage, another by William R. Morley and another by William J. Fortunate, all as agents for Asahel Gage. In Morley's affidavit he said that he visited the premises on April 27, 1881, for the purpose of serving a notice on the occupant, and found the same vacant, unoccupied and

no person in actual possession or occupancy thereof on said date. The objection to the affidavit is that he did not watch the premises continuously until the beginning of the three months' period for publication. Publication was first made on May 11, 1881, and the construction of the statute contended for cannot be entertained for a moment.

If there were any merit in any claim of a defect in the proceedings under which the deed to Asahel Gage was made it would go only to the question whether he acquired the absolute legal title to the lot, and none of them are of the slightest importance as showing or tending to show bad faith. The lot was assessed in no name and was vacant and unoccupied, but, in fact, the lot was owned by William J. Onahan, and notices were served on him and on the South Park Commissioners, Julius Rosenthal, A. M. Pence and Charles H. Ferry, who were alleged, on information and belief, to have or claim some interest in the premises. Not only was nothing proved having the slightest tendency to show any intent to mislead, deceive or defraud the owner, Onahan, but any suspicion of that kind was rebutted. To hold that any defect which would prevent the holder of a tax deed from acquiring the absolute paramount legal title is a defense against a limitation title would be to destroy and abolish the limitation law by making it ineffective for any purpose.

The decree was based on the pendency of the ejectment suit and want of good faith, and neither of them, or any other matter suggested by counsel, was any basis for the decree. Therefore the decree is reversed and the cause remanded, with directions to grant the relief prayed for in the bill and to order partition of the lot.

Reversed and remanded, with directions.

(No. 14543.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. HARVEY ROGERS, Plaintiff in Error.

Opinion filed June 21, 1922—Rehearing denied October 5, 1922.

1. CRIMINAL LAW—*what is sufficient proof of ownership in indictment for robbery—corporation.* Where an indictment for robbery alleges that the money taken was in the possession of a certain person as agent of the Western Newspaper Union and that it was taken from him by force and violence, proof of such facts will sustain a conviction even though the evidence may not show the corporate existence of the agent's principal.

2. SAME—*when defendant cannot complain of opening statement of prosecuting attorney.* A defendant is not entitled to a reversal of a judgment of conviction because of the opening statement of the prosecuting attorney that the prosecution would prove a confession which is recited in the attorney's statement but which was excluded by the court on the ground that it was not voluntary, where the defendant's counsel made no objection to the opening statement of the prosecution although they knew at the time that their client claimed the confession was not voluntary.

3. SAME—*when failure to find age of defendant will not cause reversal.* A judgment of conviction sentencing a defendant to the penitentiary for the crime of robbery will not be reversed because it does not appear in the record that the jury made a finding as to his age unless it appears from the record that the defendant was prejudiced by such failure, and where the record shows that the court was informed from the undisputed evidence that the defendant was nineteen years old there is no showing of prejudice.

4. SAME—*record must show that defendant was prejudiced by separation of jury.* A verdict will not be set aside on the bare assumption that the defendant may have been prejudiced by allowing the jury to separate and thereby giving them access to a newspaper containing an article about the trial, where there is no showing that the defendant was prejudiced or that any of the jury saw the article.

5. SAME—*confession extorted by "sweating process" is not admissible.* Extorting a confession by means of the "sweating process" is a violation of the law and of the prisoner's rights, and a confession forced by such tactics is under the law inadmissible against the prisoner on the trial, and where the record shows that a conviction was the result of admitting such confession in evidence the judgment will be reversed.

6. *SAME*—when, only, should trial judge admit confession obtained by the police. It is the duty of the trial judge in every case where he has reason to suspect that a confession has been extorted from the defendant to refuse to permit any evidence as to the confession until the State has examined every police officer and everyone present at such examination, so that the full truth may be disclosed.

7. *SAME*—jury should be guarded against the influence of newspaper articles. It is not the legal privilege of any newspaper or of any individual to get before the jury or in the hands of the jurors any character of article or utterances that tend to take away from a defendant a fair and impartial consideration of the evidence in the case, and the court should guard the jury with extreme caution against the effect of such articles or utterances.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. JOSEPH H. FITCH, Judge, presiding.

JOHN R. McCABE, (EDWARD N. SHERBURNE, of counsel,) for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, ROBERT E. CROWE, State's Attorney, and EDWARD C. FITCH, (EDWARD E. WILSON, CLYDE C. FISHER, and ALVA L. BATES, of counsel,) for the People.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

Plaintiff in error and Joseph Eagan were convicted in the criminal court of Cook county on a one-count indictment for robbery by the use of a gun. They were impleaded with Charles Conroy, Walter Buckley and Charles Olson. Only Rogers, Eagan and Conroy were tried in this trial, Conroy being acquitted. The charge in the indictment is, in substance, that they committed the crime of robbery with a gun on Louis Plomgren on February 25, 1921, and by force and violence took from his person and carried away money to the value of \$8571, the property of the Western Newspaper Union, a corporation, which money was then in the care of Plomgren. Eagan disappeared during the

trial and before the verdict was rendered. Rogers, who was proved to be of the age of nineteen years at the trial, was sentenced to serve an indefinite term in the penitentiary, and he sued out this writ of error to reverse the judgment.

The following facts were proved by the People: The Western Newspaper Union has an office in the city of Chicago at 210 South Desplaines street, where it has a printing plant, machinery and paper stock. It operates its business through managers, cashiers and other officers appointed. It has a board of directors and a president elected by the board of directors. The board of directors and the resident operating head conduct the business. The proof also shows that the board of directors has held meetings as such, and that the Western Newspaper Union has a charter, which was at the time of the trial in Maine, and issued capital stock and has a stock-book and stock-ledger. It also has a secretary and treasurer, and pays its employees by checks drawn by the Western Newspaper Union. Louis Plomgren had been employed by the Western Newspaper Union for thirty-four years, and on February 25, 1921, was its cashier and credit man. On the morning of that day, about twenty minutes after nine o'clock, he left the office of the Western Newspaper Union, accompanied by Joseph Smith, and proceeded to the Mercantile Trust and Savings Bank, at the southwest corner of Jackson boulevard and Clinton street. At the bank he received for said company, which he tied up in a package of brown paper and put rubber bands around it, \$8571, lawful money of the United States. The money made quite a large package, which was all in currency, and contained twenties, tens, fives, twos and one-dollar bills. After receiving this money Plomgren and Smith started back to the Western Newspaper Union office, Plomgren carrying the package of money under his left arm. They walked west on Jackson boulevard to Desplaines street, crossed Jackson boulevard and went north on Desplaines to Quincy street, near which point Rogers, Egan

and others jumped out of an areaway and in front of Plomgren and Smith and held guns in their faces, demanding that they throw up their hands and that they give up the package of money. Rogers pointed his gun at Plomgren, and when he demanded the money Plomgren ducked his head and started to run, but others of the robbers followed him and beat him over the head with guns and knocked him to the sidewalk, upon which he dropped the package. The blows rendered him unconscious for a short time. The robbers escaped in a Mercer touring car which they had standing at Quincy and Desplaines streets, the license number of which was 30297, which was noted by Smith. After the robbers left, Smith went to the rescue of Plomgren and raised him off the sidewalk. The package of money which he had under his arm was gone, and they never saw it from that day to the day of the trial. Both Smith and Plomgren positively identified plaintiff in error as one of the robbers, and stated that they both had a good look at him while he pointed the gun at Plomgren. They were able to identify him because of his unusual appearance, and particularly with reference to his eyes and very blonde hair. He wore a cap, a kind of brownish suit and a dark overcoat. Plomgren said his peculiar looks were due to his small, beady eyes and blonde hair. Smith described his eyes as reddish, teary or watery. Neither of them had ever seen or known Rogers before, but they had a good look at him on the day of the robbery and saw him frequently thereafter and entertained no doubt as to his identity.

The defense of Rogers was that of an alibi and former good reputation, the latter being proved by something like half a dozen witnesses. His brother, William D. Rogers, testified, in substance, that he was in the motor transportation business, and that defendant was employed by him and his partner on the morning of the robbery and was driving one of their trucks and delivering; that he worked all that day, and that between the hours of nine and ten o'clock

on that morning he started from Kedzie and Taylor streets with a car of glass; that witness helped him load that load and also a second load, the first being loaded about a quarter before nine o'clock and the second at 12:15. His mother gave corroboration by testifying that she recalled particularly that on that day defendant went to work with his brother. The alibi is not shown to be altogether inconsistent with the defendant's guilt. It does not appear at just what hour and minute the robbery occurred, but it must have taken place about ten A. M. of that date. The defendant testified the same as his brother on the question of his alibi. He denied all participation in the robbery and all knowledge thereof. On cross-examination he stated that he knew Eagan but had not known him prior to February 25, 1921, the day on which he was arrested. Buch Anderson, a real estate man, testified in rebuttal that he knew Rogers, and knew Eagan as Kearns, and that previous to the hold-up he saw Rogers and Eagan together on the back porch at 1263 Washington street, and that there was another Rogers about thirty-two years old there at the same time, but witness does not know if he is a relative of the defendant.

The first contention made by the plaintiff in error is that the evidence does not show a completed crime of robbery, but, at most, an assault with intent to commit robbery. This contention is made upon the ground that neither Smith nor Plomgren was able to state that he saw or knew who took away the package. This clearly appears to have so happened because at the time of the taking they were separated and while Plomgren was partially unconscious and Smith was detained with a gun in his face and could not go to Plomgren's rescue until the robbers left. But this proof is supplied by circumstances. When Smith did go to Plomgren the latter was down and out, the robbers gone and the package of money, too. The robbers were after money,—the particular package in question,—and that is what they demanded. They were not interrupted in the

hold-up by anybody, and it follows as a moral certainty that they did not voluntarily go off and leave the package on the sidewalk after they made Plomgren drop it. Jurors, as well as courts, are permitted to use their common sense in drawing conclusions that naturally are to be drawn from facts proved.

There was no failure to prove ownership as alleged. The proof in the record shows that the Western Newspaper Union is a corporation by user. (*People v. Buckman*, 279 Ill. 348.) Even if the proof had not established the existence of the corporation, the allegation that the Western Newspaper Union is a corporation and was the owner of the property might be regarded as mere surplusage. The indictment alleges, also, that the money was in the possession of Plomgren as the agent of the company and that it was taken from him by force and violence. This amounts, in robbery, to a sufficient charge that the property was the property of Plomgren, possession of property being a sufficient ownership under this offense as against the robber. Where, in robbery, ownership is properly alleged in one person and proved, the indictment and the verdict of guilty will not be held bad because the indictment contains a further allegation of ownership in another person that is not proved, or where the further allegation is that the property belongs to some named company that is not proved to be a corporation or a person in law. (*People v. Knox*, 302 Ill. 471.) In this case ownership was sufficiently proved in both Plomgren and the corporation to sustain the charge of robbery, and there is no variance or failure to prove ownership as alleged. The gist of the offense is the force or intimidation used in taking from the person of Plomgren, against his will, property belonging to him or in his care for another.

In his opening statement the State's attorney made the following statement to the jury: "These men got into an automobile, right after completing the robbery, which was standing near the curb with the engine running, and started

south, and at Twenty-fourth and Michigan this machine collided with an automobile belonging to the fire chief of the city of Chicago. Then the men abandoned their car and ran to 1811 Prairie avenue and deposited in a victrola there some revolvers and \$100 in currency. * * * The police went to this place at about six o'clock in the evening, and while there there was a telephone call, and the police listening heard somebody say: "This is Joe Eagan's friend; there is something the matter with your victrola; look and see what is the matter with it." The police heard this and went there [to the victrola] and got four guns and \$100 in currency. This man also said [over the telephone] that he would be there in about forty-five minutes. They waited quite a while and there was no other conversation. In the morning Rogers came over to the garage and the police took him in. * * * On February 26, that is the day they got McMahon and Eagan and Rogers in the office of Lieut. Norton, of the police department, * * * and Mr. Plomgren made a complete statement of how the robbery was done. * * * Rogers was pointed out by Mr. Plomgren when he was asked if he knew anyone in the room, and Rogers was asked also, and he said that that was the man 'we took the pay-roll from,' and the court reporter who took the statements down will be here to testify what was said by the parties at the time."

The first part of this statement as to how the robbers drove away and collided with the fire chief in his automobile was proved, and it was also proved that the robbers there left their car and ran away. It was also proved that \$100 in currency, in one-dollar bills, and four revolvers, were found in the victrola in the garage, and the police found this out in some manner by catching the conversation over the telephone, as aforesaid. The court properly refused to allow the proof to go to the jury (or rather excluded it) that related to the victrola and its contents and

as to what was said and done in the garage, because there was not sufficient proof to connect Rogers with the conversations over the phone. The confession of Rogers that he was with the party that took the pay-roll from Plomgren was also excluded by the court, because there was evidence of complaint before other judges before this trial began that Rogers had been "sweated" and beaten until he made the confession, and because a witness before the trial judge testified that Rogers had a discolored face. The trial judge properly and persistently refused to allow evidence of the confession to go to the jury, clearly on the ground that the evidence satisfied him that Rogers had been beaten into submission to force a confession. He was warranted in so doing unless all the police department men engaged or present at the sweating of Rogers were called as witnesses and satisfied the court in good faith that the confession had not been so obtained by them. Instead of doing this, the assistant State's attorney contented himself with examining the man who knew the least about what had taken place, Plomgren, who testified that Rogers answered readily and apparently voluntarily and willingly. But he did not come onto the scene, apparently, until the police had succeeded, by fair or foul means,—the court was not advised which,—in getting Rogers into a humor to confess.

The State's attorney was allowed, without objection by the defendant's counsel, to make reference to the confession in his opening statement. We are not authorized to say that the opening statement was not made in good faith and upon the assurance that the State would be able to show a voluntary confession, without intimidation, hope or promise. Defendant's counsel evidently knew as well at the time the opening statement was made as he did when the evidence was offered, that there was a claim by his client that the confession was not voluntary but was the result of violence by the police, and it was their duty to be on their guard and to object to the opening statement if they did

not want their client prejudiced thereby. There is absolutely no fault to be found with the court in its rulings on the conduct of counsel in relation to these matters, unless it was a failure to fine and jail the assistant State's attorney for his persistence in offering to prove the confession by the same witness and by other witnesses after the court had ruled it improper without first making a clean record to the effect that the confession was voluntarily and willingly made and not forced by the criminal practices of the police. The court persistently on his own motion, without at first any objection being made on the part of defendant's counsel, stopped the State's counsel and informed him that such evidence was not admissible and that it had already been ruled out. The court did this four distinct times, the last three accompanied with objections of the defendant's counsel. The court thus succeeded in absolutely preventing the witnesses from getting any part of the confession before the jury. The nearest a witness came to testifying to a confession was when he stated that defendant made a statement, except one voluntary statement made by Plomgren before the jury retired for the court to hear evidence as to whether or not he would admit the confession. This voluntary statement was to the effect that the defendant made a confession, which was not in response to the question asked him and without intimating what the confession was. The court promptly excluded this statement with the direction to the jury to disregard it entirely. Our conclusion is that the defendant is not entitled to a reversal of this judgment on account of the opening statement of the assistant State's attorney. His counsel by their silence permitted such statement and he cannot now complain. Besides, we do not think a new trial would result otherwise than in a conviction under the evidence in the record.

The court excluded the evidence relating to the money and the guns found in the victrola in the garage because the evidence did not sufficiently connect the defendant's conduct

or actions with those occurrences, and the defendant has no cause of complaint of the attempt to introduce such evidence by the People.

The defendant on his cross-examination testified to one singular piece of evidence if he was not connected in any way with the hold-up and the transactions at the garage aforesaid. Without objection on his part he testified that he was arrested at 1811 Prairie avenue,—the place where the money and revolvers were found in the victrola. He further stated that he did not have a telephone conversation with 1811 Prairie avenue prior to the time he went there. He then stated that he had a telephone call from a man who said over the telephone that he was A. Fenwick, who asked him to come to that garage. He made no statement to the effect that he did not know who Fenwick was. He did not even volunteer the information why he should answer such an indefinite call. He was not pressed to do so by his counsel or by the People, and there were no further efforts thereafter to introduce the evidence in relation to the victrola and garage.

There is also complaint that the jury did not by their verdict find the age of the defendant. The argument is that the court would not know or be informed how to exercise its discretion properly in sentencing the defendant,—whether to the reformatory or penitentiary. The court had such a discretion, as the defendant was proved to be only nineteen years of age; but we must assume that the court knew as well from the evidence in the record that he was nineteen years of age as if the jury had so found. The evidence in the record is positive and clear that the defendant was of the age of nineteen years. It was testified to by his mother, and there was absolutely no other evidence on the subject. We have heretofore held that a judgment of conviction sentencing a defendant to the penitentiary will not be reversed merely because it does not appear in the record that the jury made a finding as to his age. It must

appear from the record that the defendant was prejudiced by such failure, and the showing in the record as to what the age of the defendant is dispels all doubt of such prejudice. *People v. Simmons*, 299 Ill. 201.

The plaintiff in error finally argues that he was prejudiced by the printing of the following article, during the trial, by the *Herald-Examiner*, a morning daily newspaper printed in Chicago and having a circulation of four hundred thousand daily, to-wit:

↑ "*Cops protest Court Ban on Confessions.*

"When a Chicago police official yesterday heard Judge Fitch of the criminal court had ruled he would not allow confessions of prisoners to be introduced as evidence in trials, he said 95 per cent of the work of the department will be nullified if the policy is permitted to prevail. The judge explained he was acting in accordance with a Supreme Court ruling given in the case of Nick Viano, hanged recently for murder. The court held that a confession obtained after long mental and physical fatigue should be construed as having been forced. It was pointed out by the police official that few, if any, prisoners confess except after lengthy examination.

"'We are permitted to do less every day,' continued another official. 'Pretty soon there won't be a police department.'"

It further appears that the jurors in this case were allowed to separate and that the foregoing article had reference to this particular trial. There is no showing in the record that any juror saw this article before the trial was concluded or afterwards. There is therefore no sufficient showing for the setting aside of this verdict. We have frequently ruled that we cannot and will not set aside a verdict on the bare assumption that the defendant may have been prejudiced on the trial, in the absence of evidence showing such to be the fact.

In view of the sentiments expressed in the above article by the police department we deem it proper to give this article further notice although not necessary to a decision of this case. The sentiment so expressed confirms a preconceived opinion of this court, or at least of several members thereof, that it has been the practice of the Chicago

police in a number of cases to extort confessions from suspects arrested by them by means of what is called "the sweating process," the meaning of which is well understood without further explanation. This sweating process has no doubt been accompanied in some cases by violence or beating of the suspect into making a confession. It is not the right of a policeman or sheriff or any officer who has the custody of a prisoner to resort to such tactics to secure a confession. It is absolutely a violation of the law and of the prisoner's rights, and a confession that is forced by such tactics is under the law absolutely inadmissible against the prisoner on the trial, and in this court it is not possible for the People to sustain a judgment in any criminal case where the record shows that it was had on a confession so obtained. The practice of punishing a suspect by blows or other violence when he otherwise refuses to confess is a violation of the criminal law itself and renders a policeman subject to criminal prosecution for such conduct. It is just as much the duty of a State's attorney to prosecute an officer who has thus violated the law as it is to prosecute any other man charged with crime. It is the duty of the policemen of Chicago to do all in their power to honorably and in a legal way secure evidence against parties who violate the criminal laws in the city, and there is plenty for them to do in this line in all cases. The legitimate way is to get out in the field where the crimes are committed and hunt up legitimate evidence against the parties who commit the crimes, and at the same time respect the constitutional and legal rights of suspects arrested for crime. A conviction secured by the brutal and criminal practices already mentioned is not in the interest of putting down crime but quite to the contrary. Its natural tendency is rather to increase crime and absolute disrespect for the law and for the courts. We can conceive of no more beastly and criminal practice than the securing of convictions in the manner indicated. No self-respecting citizen, and certainly no law-

abiding citizen, can stand for such a practice after he has well studied the question. It is the most dangerous and the most uncivilized practice imaginable to allow the police to go out and arrest a man or a boy upon mere suspicion that he has committed a crime and for days subject him to the sweating process and to violence until he finally gives up and confesses in order to escape the torture to which he is being subjected. The guilt or innocence of such a suspect would necessarily be determined by the first guess of the police as to who was the real criminal, and if the police made a mistake, conviction of innocent men and boys would necessarily result from such practice.]

We desire to say, in conclusion, that we have not volunteered these closing remarks for the purpose of criticizing or abusing anyone, but for the purpose of emphasizing the fact that such practice must not be resorted to with the understanding that it can have any sort of favor by this court. Trial judges ought not to be criticised when they are following the law and trying cases in a legal and orderly manner. And we may further say that the determination of the judge in this case to do his legal duty, even at the expense of severe and unjust criticism, is all that has saved this judgment from a reversal, and he was barely able to save it from such a fate owing to the persistence of the State in its efforts to get before the jury incompetent evidence. It is the duty of the trial judge in every case when he has reason to suspect that a confession has been extorted from the defendant, to absolutely refuse to permit any evidence as to the confession until the State has examined every police officer and everyone present at such examination, so that the full truth may be disclosed; and it is not the legal privilege of a powerful newspaper or any other newspapers printed in the jurisdiction where the trial occurs, or the privilege of any individual, to get before a jury or in the hands of a jury any character of article or of utterances that would tend to take away from a defendant

a fair and impartial consideration of the evidence in the case by the jury, and the court ought to guard the jury with extreme caution against the effect of such articles or utterances.

For the reasons aforesaid the judgment in this case is affirmed.

Judgment affirmed.

(No. 14474.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, vs.
C. R. TOMBAUGH, Exr. *et al.* Appellees.

Opinion filed April 19, 1922—Rehearing denied October 5, 1922.

1. INHERITANCE TAX—*when amount of exemption is determined by prior conveyance and not by will.* An inheritance tax is a tax on the right of succession to the beneficial interest in property, and where a husband purchases a farm and causes the title to be taken in the name of his second wife, who agrees verbally that she will devise the property equally among his children and her own, the amount of the exemption as to the step-children of the testatrix under a will carrying out the trust is determined by virtue of the conveyance of the beneficial interest from their father and not by virtue of the will.

2. TRUSTS—*when Statute of Frauds cannot be set up to avoid express trust resting in parol.* An express trust resting in parol is not absolutely void even though it may not be enforceable should the Statute of Frauds be relied on as a defense, and when the trust has been executed it is as good and valid as if it had been in writing; nor can strangers set up the statute to defeat a parol trust agreement.

APPEAL from the County Court of Livingston county;
the Hon. RAY SESLER, Judge, presiding.

EDWARD J. BRUNDAGE, Attorney General, FLOYD E. BRITTON, VIRGIL L. BLANDING, and RICHARD M. O'CONNELL, for the People.

E. A. SIMMONS, for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court :

This appeal is prosecuted from a judgment of the county court of Livingston county finding no inheritance tax was due on the estate of Addie E. Allen, who died testate. She was the widow of Dr. Joel Allen, who died about ten years before her death. Dr. Allen had been previously married and had six children by his first wife and one child by the widow, who survived him. All of the seven children survived Addie E. Allen. Before his death Dr. Allen purchased 160 acres of farm land and a residence in Pontiac and caused the deeds to be made to his wife, Addie. The proof shows, without contradiction, that at the time this was done there was a verbal agreement made between Dr. Allen and his wife that she would will the property at her death to the seven children, equally. The reasons given by Dr. Allen to friends for having the title to the property put in his wife were, that his memory was failing; that he desired his wife to have the control and benefit of the property during her life and at her death she would divide it equally among the children. By the fifth paragraph of her will Mrs. Allen directed her executor to sell the real estate and personal property, and after paying her son, Wayne L. Allen, \$1200, and her step-daughter, Gertrude Allen, \$500, to distribute the remainder of the proceeds equally among the seven children. The proof showed that none of the children would receive \$20,000, but appellant contends that the step-children of Mrs. Allen were strangers in blood to her within the meaning of section 1 of the Inheritance Tax act and were only entitled to \$100 exemption. Appellees' position is, that the beneficial interest in the property did not pass to the children by the will of Mrs. Allen; that she held the title in trust for them and the beneficial interest passed to them from their father, and that they are entitled to \$20,000 exemption.

The inheritance tax is not a tax on property but is a tax on the right of succession to the beneficial interest in

property. (*People v. Griffith*, 245 Ill. 532; *People v. Union Trust Co.* 255 id. 168.) If Dr. Allen had the legal title conveyed to his wife in trust for the children, then the beneficial interest passed to them from their father and the county court correctly held it not subject to the tax, as none of the beneficiaries received or will receive anything above the exemptions the law provides.

Appellant contends the agreement of Mrs. Allen to hold the property in trust for the children and leave it to them by will at her death was an unenforcible agreement to make a will; that it was an express trust, and being in parol was within the Statute of Frauds and void. An express trust resting in parol is not absolutely void even though it may not be enforceable, if the Statute of Frauds is relied on as a defense, where performance of the trust is sought to be enforced. Trusts very similar to the one here involved have been enforced as constructive trusts. (*Stahl v. Stahl*, 214 Ill. 131; *Ward v. Conklin*, 232 id. 553; *Hilt v. Simpson*, 230 id. 170.) A parol agreement which the Statute of Frauds requires to be in writing, is, when performed, as good and valid as if it had been in writing. (*Swanzy v. Moore*, 22 Ill. 63; *Jones v. Jones*, 281 id. 595.) Mrs. Allen always recognized and admitted she held the beneficial interest in the property for the children and by her will performed the trust. The Statute of Frauds cannot be invoked to avoid a contract which has been carried into execution. (*Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Wood*, 189 Ill. 352; *Pearce v. Pearce*, 184 id. 289.) It is also well settled that the Statute of Frauds can not be interposed by strangers to the agreement. *Pasquay v. Pasquay*, 235 Ill. 48, and cases there cited.

The judgment of the county court was right, and it is affirmed.

Judgment affirmed.

(No. 14547.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. GEORGE L. FISHER, Plaintiff in Error.

Opinion filed June 21, 1922—Rehearing denied October 5, 1922.

1. CRIMINAL LAW—*when a new trial will not be granted for newly discovered evidence.* A new trial will be granted for newly discovered evidence where diligence is observed and the evidence sought to be had on the new trial is new matter not conflicting with the rule concerning cumulative evidence and is such as to strengthen the conviction that justice has not been done, but a new trial will not be granted to secure the attendance of witnesses whose testimony was known to the defendant but whose attendance at the trial he made no effort to secure by motion for continuance or otherwise.

2. SAME—*when instructions upon circumstantial evidence are proper.* Where the defense is an alibi, the whereabouts of the defendant and his presence in the vicinity where and at the time when the crime was committed are circumstances which the jury has a right to consider, and instructions concerning circumstantial evidence are proper.

3. SAME—*conviction may be sustained although but one witness identifies the defendant.* Where the defense in a trial for robbery is an alibi the weight of the evidence to identify the defendant is a question for the jury, and, although but one witness positively identifies the accused, the Supreme Court will not reverse the judgment unless the record raises a reasonable doubt as to his guilt.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. JOSEPH H. FITCH, Judge, presiding.

JOHN F. TYRRELL, (RICHARD I. GAVIN, of counsel,) for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, ROBERT E. CROWE, State's Attorney, and EDWARD C. FITCH, (EDWARD E. WILSON, CLYDE C. FISHER, and ALVA L. BATES, of counsel,) for the People.

Mr. JUSTICE STONE delivered the opinion of the court:

Plaintiff in error, George L. Fisher, with Harry Sollick, was indicted in the criminal court of Cook county for the robbery, with a gun, of certain diamonds and property from LeRoy Present, of the value of \$242,000. Separate trials were allowed, and on trial of the case against Fisher he was found guilty and sentenced to the penitentiary. The cause is brought here for review.

It is contended that the evidence does not support the verdict; that the court erred in not granting a new trial; that the court erred in its remarks in the presence of the jury and in permitting prejudicial questions to be asked, and in the admission of testimony.

The People's evidence shows that on April 22, 1921, at about 9:30 A. M., while the complaining witness, Present, was displaying a quantity of diamonds in the private office of Julius Reingold, in the city of Chicago, plaintiff in error entered the room and with a gun in his hand ordered Present to put up his hands. Present testified that he complied with this order and was told to turn his face toward the outside window; that about half a minute later a second man came in and covered Reingold and Present with a gun; that the plaintiff in error took the wallet with the diamonds, which were not mounted but were in paper packages, and Present and Reingold were tied and a handkerchief was placed over the mouth of Present; that neither of these men was blindfolded and that the assailants did not wear masks; that the value of the goods taken amounted to about \$242,000. Present, in his testimony, very positively identified plaintiff in error as being the man who came in and ordered him to hold up his hands. The testimony also shows that he identified him in Cincinnati, where Fisher had been arrested and was being held on a warrant sworn out by Present in the city of Chicago. After release from the ropes with which he and Reingold were tied, Present

called the police and gave them a description of Fisher and Sollick. John M. Connely, a police officer of the city of Chicago, testified that he went to Cincinnati on September 16, 1921, to bring back plaintiff in error; that he met Present in that city, and that he was at the police station in Cincinnati when Present appeared there with his attorney; that at that time there were four or five prisoners in the open part of the jail and that Present identified Fisher as being the man who had held him up. Present's attorney, A. B. Scolink, corroborates Connely in this particular. The State's evidence also shows that plaintiff in error and his wife were registered at the Lexington Hotel, in the city of Chicago, from the morning of April 14, 1921, until the evening of April 23, 1921, when the hotel record shows them as having been checked out. While Reingold stated that he could not identify Fisher as one of the robbers, his other testimony concerning the robbery was substantially the same as that of Present.

The defense was an alibi. In support of this defense plaintiff in error offered the testimony of M. J. Prasch, who testified that he lived in Detroit, Michigan, and that he met Fisher in Detroit on the afternoon of April 21; that he saw him buying a ticket at the Michigan Central depot that evening but that he did not know where he went from Detroit. Plaintiff in error claimed that he was in Cleveland, Ohio, on the 22d of April and not in Chicago at that time. In rebuttal of this testimony the State called A. J. Graham, a hotel clerk of the Winton Hotel, in Cleveland, where the plaintiff in error said he stayed while in Cleveland. This witness testified that plaintiff in error registered there about three o'clock on the morning of the 23d of April. There is nothing in the record other than the testimony of plaintiff in error which rebuts the possibility of his being in Chicago at 9:30 A. M. on April 22.

Plaintiff in error during the trial introduced evidence to show that he had tried to secure the presence of two wit-

nesses, one named Ginsberg and the other named Buckley, from Cleveland, by whom, it was contended, he would show that he was in Cleveland on the morning of April 22. The record, however, discloses no motion for continuance on his part or offer of affidavit in support thereof. The record does show that an assistant to counsel for plaintiff in error had interviewed these witnesses a number of days prior to the trial, and it is evident that counsel for plaintiff in error knew what they would testify to. A new trial was sought on the ground that these witnesses would show conclusively that the plaintiff in error was not in Chicago on the day of the robbery, and a new trial was asked in order that they might appear. The rule is, that where diligence is observed and the evidence sought to be introduced on a new trial is new matter not conflicting with the rule concerning cumulative evidence, and is such as to strengthen the conviction that justice has not been done, a new trial shall be granted. (*People v. Heinen*, 300 Ill. 498.) We cannot hold in this case that due diligence was exercised. As we have said, no motion for continuance by reason of the failure of these witnesses to appear was presented nor any affidavit as to what they would testify, and by reason of the fact that plaintiff in error knew what their testimony would be it cannot be said that their testimony was newly discovered evidence. It was not error to refuse a new trial on that ground.

The record does not disclose objections at the time of the trial to the remarks of the court in the presence of the jury, nor do we, on reading the record, find these remarks objectionable.

While not assigned as error, it is alleged in argument that the court erred in instructing the jury concerning circumstantial evidence, on the ground that there was no circumstantial evidence in the record in this case. This contention cannot be sustained. Testimony concerning the whereabouts of plaintiff in error and his presence in the

city of Chicago near the time of the robbery are circumstances which the jury had a right to consider. There was no error in giving the instruction.

It is most earnestly urged that since Reingold failed to identify plaintiff in error, the identification by Present, though positive in character, is not sufficient to sustain the verdict of the jury. This is a question going simply to the weight of the evidence. It has long been the rule in this State that it is the province of the jury to determine the weight of the evidence, and the fact that but one eyewitness to a crime may testify, is not, of itself, sufficient to set aside a verdict of guilty. In *People v. Maciejewski*, 294 Ill. 390, it was held, even though the identification of the plaintiff in error by one witness for the State was not positive, such testimony was competent. In *People v. Jennings*, 252 Ill. 534, the rule in regard to the competency and weight of identification testimony was discussed, and it was held that the weight to be given to such testimony is a question for the jury. It is well settled in this State that this court will not disturb the verdict of a jury in the absence of a conviction that the record raises a reasonable doubt as to the guilt of the accused. In the instant case, Present, who positively identified plaintiff in error, had an unobstructed view of him in the same room at a distance of about five feet. According to his testimony it was at 9:30 in the morning. It was raining at the time, but there was a window which opened out of the office in which the robbery occurred. He testified that he saw the plaintiff in error when he pointed the gun at him, saw him when he tied him up, saw him when he took the diamonds, and saw him go out of the office with them. He stated that there is no question in his mind as to the identification of the plaintiff in error. His testimony, together with that of the police officer, Connely, is, as we have seen, that he positively identified plaintiff in error when the latter was in a

room in the jail in the city of Cincinnati, in the presence of several other inmates.

We are of the opinion that the jury were justified in finding the defendant guilty on this record and that it contains no reversible error. The judgment will therefore be affirmed.

Judgment affirmed.

(No. 14568.—Circuit court reversed; award of Industrial Commission confirmed.)

VALENTINE JOBST, JR. *et al.* Defendants in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.*—(ALBERT WAIBLE, JR., Plaintiff in Error.)

Opinion filed June 21, 1922—Rehearing denied October 5, 1922.

1. WORKMEN'S COMPENSATION—*contributory negligence is not a bar to recovery.* Contributory negligence is not a bar to recovery of an award under the Compensation act, but the sole question is whether the injury arose out of and in the course of the performance of some duty of the employment, and not how the particular duty was performed.

2. SAME—*when injury arises out of employment in construction work.* Where an employee was required to work upon a scaffold between the seventh and eighth stories of an eleven-story building in the process of construction and did not know how to operate the scaffold so as to let himself down, an injury sustained by attempting to slide down a rope at the close of the day's work arises out of his employment, where he was attempting to follow the example of an experienced fellow-employee who had safely descended in that manner before him.

WRIT OF ERROR to the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding.

MCGRATH & THURMAN, and HENRY KNELLER, for plaintiff in error.

MILLER, ELLIOTT & WESTERVELT, (JOSEPH L. JOHNSON, of counsel,) for defendants in error.

Mr. CHIEF JUSTICE THOMPSON delivered the opinion of the court:

Plaintiff in error, Albert Waible, Jr., was employed by defendants in error in the construction of an eleven-story building. Waible was nineteen years of age and had no previous experience in work of this character. He was working on a scaffold, removing forms from completed concrete work. At the close of the day on March 9, 1920, he was working on the scaffold between the seventh and eighth stories of the building. Harry Headley, who was working on the scaffold with Waible, slid down a rope which hung from the end of the scaffold and landed safely. Waible was not able to get down without lowering or raising the scaffold or sliding down the rope. The scaffold could with difficulty have been lowered or raised by one man if the operator had been experienced in such matters, but Waible's knowledge of operating a scaffold was limited to what he had learned during the two days he had worked on this scaffold and he says he did not know how to operate it by himself. In his attempt to slide down the rope he fell the latter half of the distance and broke some bones in his foot and ankle. The Industrial Commission found that he was entitled to receive compensation for nineteen weeks' temporary total incapacity, and that he was entitled to the further sum of \$10.80 a week for fifty weeks for the reason that the injuries sustained caused the permanent loss of forty per cent of the use of his right foot. On review by *certiorari* the circuit court of Peoria county set aside the award of the Industrial Commission, and this writ of error is prosecuted to review that judgment.

The only question necessary for consideration is whether the injury to plaintiff in error arose out of his employment. In deciding this question it must be remembered that contributory negligence is not a bar to recovery under the Compensation act. (*Union Colliery Co. v. Industrial Com.* 298 Ill. 561; *Northwestern Iron Co. v. Industrial Com.*

(Wis.) 152 N. W. 416.) In the former case *Jackson v. Denton Colliery Co.* 7 B. W. C. C. 92, was quoted with approval. In that case it was said: "The sole question in this cause is whether the man was outside the sphere of his employment. It does not matter in the slightest degree how many orders he disobeyed or how bad his conduct may have been if he was still acting within the sphere of his employment and in the course of it and if the accident arose out of it." The question in this case is, What was Waible doing at the time he was injured?—not, How was he doing it? It must be conceded that he was acting within the scope of his employment when he was getting off the scaffold at the end of the day's work. Theretofore the scaffold had been raised or lowered, as the case might be, so that he could climb through a window and descend by a stairway. This would have been the safer method to have adopted, and it is not likely that he would have been injured if he had left the scaffold in the customary way. He says that after Headley left him on the scaffold he became frightened, and that he did not know any other way to descend than to follow Headley down the rope. He had seen Headley land safely, and it cannot be said that his attempt to descend by the same method amounted to a willful intention to injure himself. Awards in similar cases have been affirmed in other jurisdictions. (*Clem v. Chalmers Motor Co.* (Mich.) 144 N. W. 848; *Keyser v. Burdick & Co.* 4 B. W. C. C. 87.) Under the authorities we think it clear that the injury arose out of the employment and that the award of the Industrial Commission should be sustained.

The judgment of the circuit court is reversed and the award of the Industrial Commission is confirmed.

Judgment of circuit court reversed.

Award of Industrial Commission confirmed.

(No. 14631.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. LOGAN ESTES, Plaintiff in Error.

Opinion filed June 21, 1922—Rehearing denied October 6, 1922.

1. CRIMINAL LAW—*when irregularity in filling panel of jurors does not amount to prejudicial error.* The statute in regard to the drawing and serving of jurors must be substantially complied with, but an irregularity in filling a panel of twenty-four jurors by selecting seven jurors from a list of one hundred names appearing in a special venire already drawn instead of issuing another venire to fill the panel will not cause a reversal, where the defendant makes no claim that he was prejudiced by the court's action in that regard.

2. SAME—*failure to draw jurors twenty days before term is not error.* The statutory requirement that petit jurors shall be drawn twenty days before the first day of any trial term is directory, merely, and the failure to draw them within that time is not error.

3. SAME—*when making up a panel from jurors in attendance more than two weeks is not prejudicial error.* The fact that the jurors constituting the panel for the defendant's case were in attendance at the term as jurors more than two weeks before the defendant's trial was begun is not sufficient ground for a challenge to the array in the absence of a showing that the defendant was prejudiced thereby, as the statutory provision that no panel of jurors shall be required to render at a term of court more than two weeks' jury service is merely for the protection of the citizen against excessive jury service.

4. SAME—*when indictment is sufficiently indorsed with name of foreman of grand jury.* The middle initial of a man's name and the abbreviations "Sr." and "Jr." are no part of the Christian name, and the fact that Charles R. Carlyle, Sr., was sworn as foreman of the grand jury while Charles Robert Carlyle indorsed the indictment as foreman is not sufficient ground for quashing the indictment.

5. SAME—*when charge of an assault to commit murder is sufficiently proved.* Where a defendant is charged with an assault to commit murder and the evidence shows that the assault was made upon an officer who attempted to arrest the defendant while he was concealing a stolen automobile in an out-of-the-way shed, the facts that it was dark, that the officer, in attempting the arrest,

turned a flash-light on the defendant and ordered him to put up his hands, and that it was not shown that the defendant knew that the party whom he assaulted was an officer, do not disprove the intent charged.

6. SAME—*what evidence is not ground for new trial.* Evidence which is not conclusive or decisive of any issues in the case and which only tends to impeach one of the witnesses as to his ability to identify the defendant is not ground for a new trial.

WRIT OF ERROR to the Circuit Court of Moultrie county;
the Hon. GEORGE A. SENTEL, Judge, presiding.

EMERY ANDREWS, (RAYMOND G. REAL, of counsel,)
for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, and MERRILL
F. WEHMHOF, State's Attorney, (J. L. McLAUGHLIN, of
counsel,) for the People.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

Plaintiff in error, Logan Estes, was convicted in the Moultrie county circuit court on an indictment charging him with assault with the intent to commit murder and he was sentenced to serve an indefinite term in the penitentiary. He prosecutes this writ of error to review the judgment.

The facts proved in the record are substantially the following: Charles Lansden, sheriff of Moultrie county, had received information from certain parties, the full nature of which is not disclosed, that caused him to take with him his deputy, Charles Younger, Charles Getz, chief of police of Sullivan, and about five others, citizens of the county, to a barn or shed on a farm known in the record as the Mary Treat or A. W. Treat farm, for the purpose of making an arrest of some men that were expected to go to that place on the night of August 10, 1921. Inferentially it appears from the record that it was expected that some automobile thieves would attempt to store a stolen Ford touring car in the shed that night, and the purpose of the sheriff

and his posse was to arrest the thieves if they appeared. The reasons for the evidence not disclosing the actual information to the sheriff appears to be that the State's attorney assumed that it would be error to disclose such information on the trial of this defendant for assault to murder. The shed in question is about eighty feet long and twenty feet wide, the long way of the shed extending north and south. There is an opening or doorway in this shed on the east side, perhaps near its center. Just north of this opening there is a partition extending east and west. On the north end of the shed, close to the northwest corner, there are double doors, one opening to the west and the other to the east and on the inner part of the shed. This shed is about two miles west of the village of Gays. It is situated in a field one-quarter of a mile from the west road running by the farm, one-half mile from the road running on the east side of the farm, and about half of a quarter of a mile from the road running on the south side. There was a field of growing corn to the west and north of the shed of about forty acres and a stubble field south. The sheriff and his posse arrived at the shed about 8:30 that evening. It began raining shortly thereafter, and most of the posse had gone into the south part of the shed through the east opening to avoid the rain. After they had been there about an hour the sheriff stepped out of the building on the east side and Getz shortly afterwards followed him. In a few minutes thereafter they heard an automobile approaching from the south. The sheriff and Getz walked to the northwest corner and entered the shed through the double doors, which were open, and got behind the door that opened against the west wall. The automobile was so close that the other men of the posse in the south part of the shed did not have time to arrange themselves with a view of surrounding the men in the automobile after they had driven into the shed, and so they waited until the automobile passed the east door of the

shed, circled northeast and made its turn and headed into the shed, the automobile fronting south. The car had no lights burning, and the night was dark and it was raining. When within a few feet of the northwest opening a flash-light in the hands of one of the men in the car flashed a light into the opening of the shed, the same being turned on and off until the parties in the automobile apparently got their direction and the proper location of the opening. The automobile was then driven in darkness into the shed, the rear of the machine being three or four feet south of the doorway. One of the men followed the machine into the shed on foot, having gotten out while it was stopped to the north of the shed. He followed the machine closely and passed it on the left, walking toward the front. About this time the sheriff moved from behind the door and near the northwest opening of the shed, followed by Getz. As the sheriff got near the northeast wheel of the automobile, and while facing southeast, he flashed his light in the direction he was facing, with his left hand, and as he did so the man walking beside the machine turned around and faced him, and in that flash of light he discovered the defendant, Estes, whom he had never seen or known before, and behind Estes was the other man, a well-known character in that county and whom the sheriff had known well for many years, his name being Odd Niles. Looking into the faces of these men, the sheriff, with an automatic revolver in his right hand, said to Estes and to Niles, "Hands up!" The sheriff repeated this command, and without saying a word Estes drew his gun, and at that moment the sheriff turned off his flash-light and attempted to shoot Estes. His gun failed to go off and he instantly stepped to the right or back of where he was standing, and then Estes fired three shots in the direction where the sheriff was when he turned his light out, and then Niles began shooting. Both Estes and Niles advanced north, firing their guns rapidly until they passed out of the opening behind the automobile, one

of them running northwest and the other straight west into the cornfield. While they were coming out of the shed they shot at Lansden and Getz, who had been standing beside the sheriff all this time, and Lansden and Getz fired at the men as they ran away. The other six men of the posse previous to this time had gone to the north side of the shed, near the north doorway, and as the men ran from the shed these members of the posse began firing at them with shot-guns and revolvers. As the man running northwest got to the edge of the cornfield a number of the posse saw him fall and it was believed by them that he was so wounded that he was unable to arise, but when they hunted for him later they found that both men had gotten away. About twenty shots or more appear to have been fired by the posse and the two fleeing men. Three of the posse positively identified Odd Niles as being one of the men,—Lansden, Getz and C. O. Glasscock, all of whom had known him well for years. These three men had never before known Estes, but they got a good view of him on that night by the flash-light of the sheriff, although it was only for a few moments. They recognized him by his short, stubby mustache and other appearance after he was arrested and on the trial as being the party who was with Niles in the shed.

There was no testimony offered by the defendant, except that he placed on the witness stand Niles, who, it appears, had been in prison for some other offense shortly before and up to the trial. Niles testified that he used to reside in Moultrie county, six or eight miles from Sullivan, and that he resided there ten or twelve years; that he knew Grover Garrett, Zion Buckalew, Billie Kinkade, Owen Glasscock and Lansden, all of whom were of the sheriff's posse on the night of the shooting at the shed; that he did not care to make any statement about the occurrence on that night, for the reason that he understood he was indicted upon the same charge.

The Ford car, after the shooting, was taken from the shed and placed in the garage of V. F. Stanberry, at Gays. It was afterwards identified by C. W. Cox, of Mattoon, the owner of the car, and was turned over to him by Stanberry after the wife of Cox had produced a card issued by the Secretary of State showing that the license had been issued to Cox and after other satisfactory evidence had been revealed. Cox testified positively on the trial that the car was his car and that it was stolen in Mattoon on the night of August 10, 1921. The car was a new Ford car, and he had placed an identifying mark under the engine with a chisel. The evidence proves conclusively that the car in which Estes and Niles drove to that shed that night was stolen and the property of Cox, and that he last saw it about seven o'clock on the evening of August 10. It is also conclusively proved that the defendant made an assault upon Lansden with intent to kill and murder him, which is the substance of the charge in the indictment. Lansden was not described in the indictment as sheriff of the county of Moultrie, and there is no charge that the intent was to kill an officer. The jury would not have been warranted in returning any other verdict, under the evidence in the record, than the verdict returned by them. They fixed the age of the defendant at forty-five years.

All the errors assigned by the plaintiff in error are of a technical character, one of which is that the court erred in overruling his challenge to the regular panel of the jury that was serving at the time the defendant's trial was begun. The challenge was to the array. The record shows in this regard that there were three venires issued and served for petit jurymen at the September term. The first venire contained the names of thirty men, whose names were regularly drawn by the clerk, as provided by the statute, before the term was begun, and they were duly served. After court had been held for a few days only twenty-two jurors were left of this thirty for the regular panel after all entitled

to be excused had been excused by the court. In accordance with section 12 of the Jurors act the court ordered the clerk to draw from the jury box the names of four jurors in the regular way to fill the panel, and they were so drawn and a venire issued November 14, 1921, and the sheriff returned the same served November 18, 1921. There can be no question that this panel was regularly drawn and served and properly filled by the court as aforesaid. On November 21, 1921, by order of the court a third venire was issued for one hundred jurors, drawn in the usual way by the clerk. Thirty-two of them were returned served by the sheriff November 22, 1921. It does not definitely appear from the record for what purpose this venire was issued for one hundred jurors,—whether the venire was ordered for jurors in this case or for jurors in another case tried in that court, known as the Steele case. It is very apparent that the court ordered this venire issued in accordance with the closing proviso of section 8 of the Jurors act, that “whenever there shall be pending for trial in any of said courts any criminal cause wherein the defendant is charged with a felony, and the judge holding said court shall be convinced from the circumstances of the case that a jury cannot be obtained from the regular panel, to try the cause, said judge may at his discretion, prior to the day fixed for the trial of said cause, direct the clerk to draw (in the same manner as the regular panel is drawn) not exceeding one hundred names as a special panel from which a jury may be selected to try said cause.” It is therefore clear that the court was acting within his right and within his discretion in ordering the third venire, and that the jurors were regularly drawn and regularly served and for a proper purpose.

In the week of December 5 the court impaneled twenty-four jurors as a regular panel with which to try the defendant. The clerk testified that the previous panel of twenty-four was reduced to about twenty at this time, and that this twenty was composed of jurors served by the first and

second venires. The clerk also testified that none of these twenty had served as jurors at all, although the court had been in session several weeks. It does not definitely appear from his testimony whether he means that the jurors had not served on any case, or whether he means simply that they had been there the full two weeks but had not been used as jurors, and we have read the abstract of his testimony carefully. At any rate, to the twenty jurors the court ordered the clerk to add seven that had been summoned by the third venire, calling the names of those jurors in the order they appeared on the venire,—that is, those that were served. From the twenty-seven jurors thus called into the jury box the court excused three served by the third venire, and the remaining twenty-four were ordered to stand as the panel with which to try the defendant. We do not think that there was reversible error in the impaneling of the twenty-four jurors, under the holding of this court in *North v. People*, 139 Ill. 81, and *Siebert v. People*, 143 id. 571. Had the court gone strictly according to the statute in filling this panel, instead of taking seven jurors whose names appeared in the third venire, the process would have been to order the clerk to issue a fourth venire to fill this panel; but he already had had a regular venire of one hundred names regularly drawn, a part of whom had been served, and we think the full intention of the statute was carried out by taking seven men from this list to fill the panel. The fact that the whole hundred jurors were not served can cut no important figure in the case. The important facts are, that the statute requires that an insufficient panel be filled from jurors regularly drawn by the clerk and served. That is exactly what happened in this case, the only irregularity being, if it was an irregularity, that the seven jurors of the third panel were not drawn and served for the particular purpose of filling the regular panel. The defendant makes no claim whatever that he was prejudiced by the court's action in thus filling the reg-

ular panel. He did not exhaust all of his peremptory challenges in the selection of a jury to try him. It is not the policy of this court to reverse a judgment for a purely technical error unless prejudice is shown to the defendant by such error. The statute, however, regarding the drawing and serving of jurors must be substantially complied with. The fact is that in this case the provisions of the statute have been substantially complied with in that regard in every particular.

Section 8 of the Jurors act provides that "at least twenty days before the first day of any trial term of any of said courts, the clerk of such court shall repair to the office of the county clerk, and in the presence of the county judge and of such county clerk, after the box containing said names has been well shaken by the county clerk and being blindfolded shall without partiality, draw from said box the names of a sufficient number of said persons then residents of said county, not less than thirty for each two weeks that such court will probably be in session for the trial of common law cases, to constitute the petit jurors for that term, and where there is an additional judge in such court, a like number for each additional judge requiring a jury, unless the court shall otherwise order." The requirement of this section that such drawing shall be twenty days before the first day of any trial term is directory, merely, and failure to draw the names within that time is not error. (*Rockford Ins. Co. v. Nelson*, 75 Ill. 548.) The intention of the statute is that no panel of jurors shall be required to render at a term of court more than two weeks' jury service, and is a provision for the protection of the citizen against excessive service of that character. The juror may waive this privilege, but the court should give him the benefit of this section and not require him to serve beyond the required time unless he does so voluntarily. Of course, this section must be construed reasonably, and if a juror's service extends beyond two weeks by reason of the length of

time required to try a case begun before the two weeks' service was ended, the juror would of necessity be required to serve until that particular case is completed. If for any reason a panel of jurors has become familiar with the facts of any case standing for trial by reason of the particular character of the case, the panel should not be retained to try that case after its two weeks' service has ended, if the parties litigant in that case object to the panel being used for that trial. It is clear that it is not a peremptory right of a defendant to challenge the array on the particular ground that the panel had served two weeks, in the absence of a showing that he might or would be prejudiced thereby, and it is also clear that a defendant might expressly waive his right to be tried by a new panel, and that he would waive such right in the absence of a positive objection to the array. The safe plan for any court to pursue is to follow the provisions of the statute, or to secure an express waiver by the jurors and by parties litigant before continuing to use a regular panel that had served its full two weeks. Conceding that the panel in question in this case had been in attendance full two weeks at the term of court before defendant's trial was begun, it was not reversible error for the court to overrule his challenge to the array in the absence of a showing that he was prejudiced thereby. There is no such showing in this record nor is there any such claim by the defendant, and the fact that he did not exhaust his peremptory challenges is a sufficient showing that he has no good cause to believe that he was prejudiced. We may further add that a juror who has been in attendance the full two weeks during the trial of cases completes his statutory service of two weeks although he may have been rejected on every case wherein he was tendered as a juror. There is no basis for the claim of the defendant that the jurors were selected to fill the regular panel with a special view of obtaining a jury that would be unfavorable to him in his trial.

The court did not err in overruling the motions of the defendant to quash the indictment and arrest the judgment. The motion to quash was based on two grounds, the first being that Charles R. Carlyle, Sr., was sworn as foreman of the grand jury, while Charles Robert Carlyle indorsed the indictment as foreman of the grand jury. It has been repeatedly held by this court that the middle initial of a man's name is no part of his Christian name. It has also been held that the abbreviations "Sr." and "Jr." are no part of the Christian name. (*Bonardo v. People*, 182 Ill. 411.) But the claim is made that the court is not warranted in assuming that Charles R. Carlyle and Charles Robert Carlyle are one and the same person, and that it must be taken, therefore, that the foreman of the grand jury in this case, Charles R. Carlyle, did not indorse this indictment. We may and will take judicial notice of the fact that it is a common practice in this country for a person to bear two given names in addition to his family name, and that his name is usually and commonly written by spelling in full the first given name and using only the middle initial of the second given name, and that sometimes, but rarely, an individual writes both given names in full in signing his name. It is assumed by the defendant that because of the fact that Charles R. Carlyle was further designated or identified by the abbreviation after his name of Sr. there are two Charles R. Carlyles in the same community, and that the other is or may be described as Charles R. Carlyle, Jr. Granting that this is true, we have the same right to assume that the names of both of them are Charles Robert Carlyle, as there would be no special occasion to use the abbreviations Sr. and Jr. unless that were the case, and that a proper writing of either of the names would be Charles R. Carlyle. The middle initial, "R," would therefore stand for the name Robert, whether written by the one or the other of the two Charles Robert Carlyles. As Charles R. Carlyle was selected and sworn as foreman of

the grand jury in this case, we are warranted in assuming that the same Charles R. Carlyle indorsed this indictment by writing his full name, Charles Robert Carlyle. Had the middle initial of the foreman of the grand jury been other than the letter "R" we would not have been warranted in assuming that the foreman of the grand jury and Charles Robert Carlyle, who indorsed the indictment, were one and the same person, as the middle initial of the foreman could not be taken to stand for or to be an abbreviation of the name Robert. It would be an unusual assumption to conclude that because Charles R. Carlyle, Sr., was sworn as foreman, Charles Robert Carlyle, Jr., had indorsed this indictment as Charles Robert Carlyle because of the fact that the indictment was indorsed by Charles Robert Carlyle. The presumption is that the foreman selected did his duty and indorsed the indictment in this case.

The other objection to the indictment is that it is bad because it avers no intent to kill Charles Lansden. The charge in the indictment is that the defendant with a certain gun then and there held in his hands and loaded with powder and leaden bullets, unlawfully, willfully and feloniously and with malice aforethought did assault one Charles Lansden, then and there being in the peace of the people, and did then and there discharge the said loaded gun at the said Charles Lansden with the intent in and upon him, the said Charles Lansden, then and there unlawfully, willfully and feloniously and with malice aforethought to commit a murder. The last words in the charge, "to commit a murder," are not the words ordinarily used, but it is clear that the indictment does charge an intent to kill and murder Charles Lansden and not to kill and murder somebody else not named while upon the person of Charles Lansden, as argued by the defendant. The court properly overruled the motion to quash the indictment.

The claim of the defendant that there is no proof in the record that he intended to kill Lansden because there

was no proof that the gun with which he was shooting at Lansden was loaded with leaden bullets, and that he therefore had no ability at that time to kill Lansden, is not tenable. He was accompanied by a desperate and dangerous character, Odd Niles, and they were driving an automobile that had been stolen, and their actions in approaching the shed with the car not lighted were strong circumstances tending to show that they had stolen and were driving away and concealing the automobile that had been stolen less than four hours previous to their driving into the shed. This shooting and the crime of stealing the automobile were so closely connected in their facts as to be one continuous transaction, and it was not possible to separate the facts in the two crimes and get a proper understanding of their conduct and the bearing of such conduct in proving the crime charged. It would have been admissible to have proved that the sheriff had been informed of the fact that the very automobile already mentioned was stolen on that evening and that it was expected that the thieves would drive the car to that shed, and the proof shows, inferentially, that this was the character of the information received by the sheriff before he undertook the arrest. He had a right to collect a posse on such information and to go to the shed and see what happened, and to arrest all persons coming there whose conduct and the possession of such a car showed that they were the parties suspected and to arrest them without a warrant before they could get away. For them to resist Lansden and to kill him to prevent his arresting them would render them guilty of murder, and that is what they plainly attempted to do. The attempted arrest was not unlawful, and their desperate conduct when they were faced by the sheriff and Getz with guns in their hands, to shoot them down and escape, shows clearly that they were resisting arrest for crime, and that they were using loaded guns and not cartridges without bullets. Niles knew the sheriff and the defendant knew

Niles, and the bare fact that the sheriff did not make known to Estes the fact that he was an officer does not demand, under the circumstances, that the jury draw the conclusion or presumption that the defendant thought he was resisting a robber or hold-up man in that out-of-the-way shed. The defendant evidently knew that that was not a place where he could expect to meet robbers or a man that would hold him up for his money or property, but simply a place where he could only expect to see or meet men who were after him because he was supposed to be one of the automobile thieves. All the circumstances show that the defendant carried a loaded gun and that he was shooting a gun loaded with gunpowder and leaden bullets at the officers to prevent his arrest and with intent to kill them. As there was no charge of an assault with the intent to kill an officer, none of the points raised by the defendant have any material bearing on his conduct on that occasion because of the fact that it was not shown that the defendant knew that Lansden was an officer.

The town of Windsor is in Shelby county. Six miles east of Windsor is the village of Gays, in Moultrie county, and about six miles east of Gays is the city of Mattoon, in Coles county. These towns are all on the Big Four railroad, and the railroad runs either through or along the south side of the farm where the shed is located. The People introduced considerable circumstantial evidence tending to show that the defendant was the party that the posse wounded at the shed, and that after the shooting he traveled over that neighborhood trying to telephone to his home in Mattoon for aid. Early in the morning of August 11 a stranger awakened two farmers, Will Sampson and S. A. Walker, who lived near each other on the public road about four miles west of Gays and two miles east of Windsor. This was about 1:30 A. M., and the stranger asked Sampson if he had a telephone, and on being informed that he had a telephone but that it was out of use the stranger went to

Walker's. He called up Walker and asked him to call up Mattoon for him on his phone, saying to Walker that his car had broken down about a quarter of a mile east of there and that he wanted help. He gave the number of the phone that he wanted in Mattoon, but the witness could not remember the number but thought it was about 1664. He asked the stranger why he did not call the man nearest to his car, and he replied that he had but his phone would not work. Walker tried to call up the number of the phone in Mattoon wanted but could not get central, and told the stranger so and that he might get it at the next house. These places were about two miles from the shed. On the same morning, about three o'clock, a stranger came to the Big Four tower at Windsor and called up to C. E. Hill, the night telegraph operator of the Big Four, and asked him to telephone to a number at Mattoon for him, which number Hill could not remember. He told the stranger to come up and use the telephone, but he replied that he had rheumatism and because thereof he could not climb the stairs. He told Hill that his car had broken down half a mile west of Windsor and that he wanted help, and then asked Hill where he could find another telephone. Hill directed him to the hotel, about fifty or sixty feet from the tower, and saw the stranger go to the hotel and knock at the door, and noticed from the sound his shoes made when he walked that the stranger's feet were wet and that he was lame in his left limb. Hill had heard of the shooting the night before and examined the road west of Windsor for a mile within thirty minutes after the stranger left him but could not find or see any car on that road. He heard the stranger call up Mrs. Bowen, proprietor of the hotel, by knocking on the door. He told Mrs. Bowen the same story about the breakdown of his car and asked her to call for phone No. 1656 at Mattoon and to ask the folks at that number to come after him,—to tell them "Nickerson wanted them to come after him,"—and directed them to come to

the place where the car was broken down. She called for that number and got it and telephoned his message to the folks there. He refused to use the telephone himself, giving as an excuse that he was wet and muddy, and he remained out in the dark while she was phoning. A woman replied to Mrs. Bowen at No. 1656, in Mattoon.

About one o'clock A. M. of August 12 several parties went from Gays in an automobile to hunt for the party that was supposed to have been wounded at the shed the night before. About one mile west of Gays they found the defendant walking east on the Big Four railroad, near the public road, traveling very slowly and using a cornstalk for a cane. He appeared to be very lame in his left leg. On arresting him they found on his person a flash-light and a screw-driver. One of the party recognized him as "Doc" Estes, of Mattoon. Estes told them that he had rheumatism very bad and could hardly get along, and that he was going to Mattoon. They took him in custody and drove back to Gays with him. They noticed that he was wounded and that he blooded the chair considerably that he sat on. On being interrogated he said that he had come a long ways and refused to tell how he had got wounded or shot, saying that that was his business. He told them sometimes men got shot in self-defense and sometimes they got shot in going over the fence. He at first denied that he ever knew or heard of Odd Niles. He later admitted that he had heard about him but was not acquainted with him and never saw him. He admitted finally that he was personally acquainted with Niles. After he was turned over to the sheriff he was examined by Dr. Lawson, who testified on the trial that he found a gunshot wound on the defendant's left hip; that the wounded part was about three inches in diameter and that the skin and muscles were punctured within that area with a number of small-sized shot, about No. 4, and that his clothing was torn and rent about the wound. The doctor stated that it was a very serious wound; that

he made this examination about four o'clock on the morning of August 12; that the wound had been made at least twelve hours or more prior to his examination. Sheriff Lansden testified that while the defendant was a prisoner at the jail three persons from Mattoon visited him frequently at the jail. Two of them were women,—one Miss Flaharty, and the other Mrs. Estes, who the defendant said was his wife. While Mrs. Estes was at the jail she asked that the telephone No. 1656 at Mattoon be called for her for the purpose of talking to a person at that number, that being the same number the stranger had called for at the hotel in Windsor, and she talked to someone at that number.

The foregoing evidence as to the stranger who was trying to telephone to Mattoon is strongly urged by the defendant as incompetent and prejudicial because the stranger was not identified as being the defendant. We think the defendant was sufficiently identified by circumstantial evidence as the stranger who was trying to telephone to his home in Mattoon for help while he was wounded and scarcely able to travel. This appears from the similarity of the stranger's stories to each person whom he asked on the morning of the eleventh of August to telephone to Mattoon for aid for him to the story of the defendant when arrested. The stranger was lame in his left limb, the same as the defendant, and claimed, as did the defendant, that he had rheumatism very bad. The evidence further shows that telephone No. 1656 in Mattoon was listed at the telephone central in Mattoon in the name of Myrtle Flaharty.

There were some minor errors committed by the court in allowing certain parts of the evidence in regard to telephoning to go to the jury, but they are unimportant in the decision of the case. There can be no question about the guilt of the defendant, and another trial would not result in a different verdict as the record discloses in this case. The instructions for the People were stock instructions, and there is no reversible error to be found in the giving of any of them.

The newly discovered evidence offered by the defendant only tends to impeach one of the witnesses as to his ability to identify the defendant as the party with Niles at the shed. Such evidence is not conclusive or decisive of any issue in the case and is not ground for a new trial. *People v. Johnson*, 286 Ill. 108.

Defendant's motion for continuance was properly overruled.

The judgment of the circuit court is affirmed.

Judgment affirmed.

(No. 14498.—Judgment affirmed.)

MAX ROTHSTEIN *et al.* Appellees, *vs.* JACOB G. GROSSBERG
et al. Appellants.

Opinion filed June 21, 1922—Rehearing denied October 5, 1922.

PRINCIPAL AND AGENT—*when attorneys cannot retain proceeds of checks for services rendered an agent.* Attorneys who for services rendered an agent in his private affairs receive checks drawn by the agent on his principal's funds and signed in his principal's name by himself, as agent, to cover the retainer fee and a portion of the amount deposited to indemnify the agent's bondsmen, can not, as against the principal, retain the proceeds of the checks for their fees.

CARTER, J., specially concurring.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Municipal Court of Chicago; the Hon. HOSEA W. WELLS, Judge, presiding.

JULIUS L. KABAHER, for appellants.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellees, Max Rothstein and William Rothstein, partners under the name of Majestic Dress Company, engaged in manufacturing dresses in the city of New York,

brought this suit in the municipal court of Chicago against the appellants, Jacob G. Grossberg and Nathan Haffenberg, a firm of attorneys practicing in Chicago, to recover the proceeds of checks received by the defendants from E. B. Weitzen, agent of the plaintiffs in charge of a branch of the business in Chicago, in payment for legal services rendered to the agent, Weitzen. The affidavit of merits stated that the checks were received by the defendants from Weitzen for legal services rendered to him, without knowledge or notice that the checks were not his property or that he did not have full right and authority to dispose of the proceeds. The cause was tried by the court without a jury and judgment was rendered for \$790.50. On appeal to the Appellate Court for the First District the judgment was affirmed, and a certificate of importance was allowed and an appeal to this court.

There was no substantial disagreement as to the facts, which are as follows: The plaintiffs manufactured dresses in the city of New York and established a branch in Chicago for the sale of their product. E. B. Weitzen was placed in charge of the branch business, and by written contract agreed to operate the branch in the name of the Majestic Dress Company and give his whole time and attention to the business under the sole direction of the plaintiffs. The plaintiffs were to supply merchandise, to be charged to the Chicago branch at cost, plus ten per cent, and was to be sold in the name of the plaintiffs. Weitzen was to have no power to buy any merchandise or incur any debts or expense on behalf of the plaintiffs unless first authorized by them. He was to receive payments for sales and deposit the moneys in such bank as the plaintiffs might designate, under the name of the Majestic Dress Company and to its credit. All approved expenses of the branch were to be paid direct from that account and no payments were to be made from the funds of the Majestic Dress Company for any other purpose. All checks drawn on the deposit account

were to be signed by Weitzen in the firm name as agent, as follows: "Majestic Dress Company, by E. B. Weitzen, Agent." He was to receive a salary of \$50 per week and 33⅓ per cent of the net profits. The plaintiffs designated the National City Bank of Chicago for the deposit of funds. Weitzen took charge of the branch business in Chicago and in September, 1918, was arrested by Federal authorities under the Mann act and imprisoned. His brother, Joe Weitzen, applied to the defendants for legal assistance and to secure a release on bail. The defendants agreed to take charge of the matter and informed Joe that they must have a retainer and the sureties must be indemnified. The bail was \$1500, and Joe took a lot of blank checks of the Majestic Dress Company and made a pencil notation of his initials on them. The blank checks were taken to Weitzen, who signed the same in blank, "Majestic Dress Co., by E. Ben Weitzen, Agent." The checks were delivered to Joe, who took three of them to the office of the defendants and the blank checks were filled out by the defendant Nathan Haffenberg. One check was to the order of the defendants for \$250, which Joe marked "Retainer." The other checks were filled out payable to bearer, one for the sum of \$1000 and the other for \$500. The checks were taken to the bank by Joe to be certified. The check for \$250 was certified, but the bank refused to certify the \$1000 check because it was drawn to bearer. Joe went back to Haffenberg and notified him of the objection made by the bank and telephoned to Dorothy Hirsch, the book-keeper at the branch, and she went to the bank and indorsed the check and the bank gave her \$1000, which she handed over to Joe, and he took the currency and \$500 check to Haffenberg. There was not sufficient funds to cover the \$500 check, and it was held for a few days, when it was deposited to the credit of the defendants and paid. The checks for \$1000 and \$500 were to be for the security of the bondsmen, and it was agreed that Haffenberg should hold

them for that purpose. The trouble was soon after settled by the marriage of Weitzen and the woman and he was discharged from custody. The defendants made a charge of \$500 in addition to the retainer, and on October 9, 1918, Weitzen notified them to turn over to the plaintiffs the \$1000 in currency and the check for \$500 which they held to indemnify the bondsmen, stating: "The foregoing sum of \$1500 is and was withdrawn from the funds of the Majestic Dress Company and the money should be turned over to them." On October 12, 1918, the defendants paid the plaintiffs' attorney \$1000 without prejudice to the rights of either party.

The court held propositions of law and fact, some of which were conflicting and would have led to a judgment for either party, and others stating rules of law not applicable to any evidence in the case but based on rules for governing the transfer of negotiable paper by one having apparent title and authority. It is not necessary to consider the propositions, since the judgment was the necessary result of the application of the law to the facts.

The proposition that the defendants were entitled to retain \$750 for services rendered to E. B. Weitzen because \$1000 was delivered to Haffenberg, and, as money has no ear-marks, the defendants had a right to assume that it was the money of Weitzen, cannot be entertained for several reasons. The defendants did not receive the \$1000 in currency as payment but as a trust fund, to be returned on the release of the bail. The check was filled up by Haffenberg and was drawn on the bank account of the Majestic Dress Company of Chicago in its name by E. Ben Weitzen, agent. The check was sent to the bank and the money received and given to Haffenberg, so that there was no reliance on any assumption that the currency belonged to Weitzen. Notice appeared on the face of that check and the other checks that they were drawn on the account of the Majestic Dress Company, and Weitzen was acting as

an agent in a representative capacity and his authority was limited by the scope of his agency. As the checks were signed, the designation "agent" was not a description of the person but showed a relation to the Majestic Dress Company as agent, and the defendants had no right to assume that Weitzen was either the Majestic Dress Company, a partner in the firm, or that he occupied any other relation than that, in fact, he did occupy as an agent. The defendants had actual knowledge that Weitzen, the agent, was drawing out of the funds of the Majestic Dress Company money for his own purposes and for his own private benefit, and the consideration for which the checks were given was not for any services for that company. The transaction was simply and plainly payment of the retainer by an agent by means of the check for \$250 drawn on the funds of his principal and the deposit of \$1500 for the personal benefit of the agent to indemnify his bondsmen.

Counsel for defendants says that the remedy was in equity to adjust accounts with Weitzen and therefore the municipal court had no jurisdiction, and that it was error to allow interest on the moneys of the plaintiffs received for their use by the defendants and withheld. There is no assignment of error on either proposition.

The judgment was right, and the judgment of the Appellate Court affirming it is affirmed.

Judgment affirmed.

Mr. JUSTICE CARTER, specially concurring:

I concur for reasons not stated in the foregoing opinion with the conclusion reached therein. I do not see how appellants can raise the question here as to whether or not the \$1000 received from the bank by them was given to them by check or in cash, for under the affidavit of merits filed by appellants they practically concede that it was paid by check. They therefore cannot now raise the question in this court whether it was paid by check or cash.

(No. 14177.—Decree affirmed.)

FRANK P. HAWKINS, Appellee, vs. THE COUNTY OF LAKE
et al. Appellants.

Opinion filed June 21, 1922—Rehearing denied October 6, 1922.

1. **APPEALS AND ERRORS**—*when assignments of errors must be several and not joint.* An assignment of errors is regarded as a declaration and each assignment as a count of a declaration, and where parties join in assigning errors the errors assigned must be good as to all appellants or they will not be good as to any, and if the errors complained of do not affect all the appellants the assignments of such errors must be several and not joint.

2. **SAME**—*when parties may join in assigning errors.* The rule that where parties separately appeal or bring error or complain of errors which do not affect all of them they cannot join in assigning errors does not apply where the judgment is a joint judgment or where an error is assigned that is sufficient to reverse the judgment as to one or as to all of the appellants, as where the court has no jurisdiction of the subject matter or where the judgment or decree cannot be sustained for want of necessary parties.

3. **PLEADING**—*the objection of multifariousness is waived if not raised by demurrer.* The objection of multifariousness or misjoinder must be raised by demurrer and if not so raised it is waived, and it is in the discretion of the court whether or not the objection will be considered when raised by answer.

4. **TAXES**—*equity may enjoin collection of taxes to avoid multiplicity of suits.* Equity may enjoin the collection of a tax which is unauthorized by law, as it would involve a multiplicity of suits to require the tax-payers to wait until sued by the taxing authorities before raising their objections.

5. **SAME**—*when a tender of taxes admitted to be due is sufficient.* Where tax-payers seek to enjoin the collection of a tax which they claim is in excess of the amount authorized by law and have tendered the amount admitted to be legal and collectible, it is immaterial that some of the tenders were not legal tenders because made by checks or otherwise, where the collector informed the tax-payers that under no circumstances would he accept less than the entire taxes assessed and that it would be of no use to make such tenders.

APPEAL from the Circuit Court of Lake county; the
Hon. CLAIR E. EDWARDS, Judge, presiding.

A. V. SMITH, GEORGE A. MASON, IRA J. GEER, and SAMUEL S. HOLMES, (HENRY E. MASON, and CYRUS H. ADAMS, JR., of counsel,) for appellants.

ERNEST S. GAIL, HENRY F. DICKINSON, and SCHUMACHER & MURPHY, for appellee.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

Frank P. Hawkins, appellee, a tax-payer and resident of the city of Highland Park, on behalf of himself and all other tax-payers of said city who had not paid the taxes complained of by him, filed his bill in the circuit court of Lake county to enjoin Roy W. Bracher, county treasurer of said county, Lew A. Hendee, county clerk, the county of Lake, the North Shore Sanitary District, the township of Deerfield, the Deerfield-Shields High School District, School Districts Nos. 107 and 108, the Highland Park East Park District and the city of Highland Park from collecting or attempting to collect from the person or property of himself or any of the tax-payers and property owners of the city of Highland Park certain taxes alleged to be illegal, fraudulent and void, which had been levied and extended against the property of said tax-payers. Two days later a similar bill was filed by Gordon Buchanan, a tax-payer and resident of the city of Highland Park, on behalf of himself and all other tax-payers of said city, to restrain the same defendants from collecting or attempting to collect against the person or property of himself or any of the tax-payers and property owners of the city of Highland Park certain taxes also alleged to be illegal, fraudulent and void, which had been levied and extended against the property of said residents of the city. All of the defendants appeared in court and filed their separate demurrers to each of the bills of complaint. Both causes were consolidated. Hawkins amended his bill by leave of court and the demurrers were re-filed thereto. Temporary injunctions were issued May

23, 1921, in accordance with the prayers of the bills. On July 11, 1921, the court entered an order overruling all the demurrers to Buchanan's bill and also to the amended bill of Hawkins. Thereafter the county of Lake, Roy W. Bracher, county treasurer, Lew A. Hendee, county clerk, the Highland Park East Park District, the boards of education of school districts Nos. 107 and 108 and the city of Highland Park answered the bills. The North Shore Sanitary District and the township of Deerfield declined to further answer the bills and were defaulted and decrees *pro confesso* were entered by the court against them. The Deerfield-Shields High School District elected to stand by its demurrer, and the court entered a decree against it in accordance with the prayers of the bills. Upon a hearing before the court a decree was also entered on August 1, 1921, against the defendants answering the bills and in accordance with the prayers thereof. The Highland Park East Park District, the city of Highland Park, Roy W. Bracher, county treasurer, and the Deerfield-Shields High School District have appealed to this court from the decrees.

The county of Lake has less than 100,000 inhabitants. The illegal taxes complained of were assessed for the year 1920. The first illegal taxes complained of in the Hawkins bill were occasioned in the several defendant municipalities by the board of review raising the assessment of the assessor in the city of Highland Park thirty per cent in August, 1919, for the purpose of equalization. This tax was held illegal by this court in *People v. Vail*, 296 Ill. 61. The assessment raised by the board of review was the quadrennial assessment of 1919, and the board has never since taken any further action to increase the assessment of the assessor. The taxing authorities again extended the tax for 1920 on the illegal assessment so raised by the board of review. This illegal tax is the only tax complained of in the Buchanan bill, although it affects the same municipalities made parties defendant in the Hawkins bill. The

other illegal taxes complained of in the Hawkins bill are the following: (1) All illegal taxes in the defendant municipalities occasioned by the county clerk failing to scale the various taxes under the provisions of the Juul law,—the excess over two dollars on the \$100, etc.; (2) taxes assessed in said municipalities to pay \$47,000 interest and \$50,000 principal on bonds purported to have been authorized by the board of supervisors of Lake county and which were not authorized by said board and which had never been issued; (3) ten cents on each \$100 assessed in the North Shore Sanitary District, and void because levied on all lands and lots in the cities and villages but not on lands and lots outside of such cities and villages and lying within the sanitary district; (4) \$1500 appropriated and levied by ordinance of the Highland Park East Park District said year for salaries of officers and employees, treasurer, secretary, attorney, engineer, clerks and other employees, including a police force, and without specifying the amount for officers or for employees or for any officer or employee.

The Deerfield-Shields High School District is affected herein only by the decree rendered as to the illegal tax occasioned by the thirty per cent horizontal increase by the board of review of 1919. It was the only defendant that stood by its demurrers. The decrees entered against the defendants and the various appellants are all several and not joint decrees. The errors assigned on this record are all assigned jointly by the four appellants, the Highland Park East Park District, the city of Highland Park, Roy W. Bracher, county treasurer, and the Deerfield-Shields High School District. The errors assigned and argued by appellants are: (1) The court erred in overruling the demurrers of all of the appellants; (2) in taking jurisdiction of the subject matter, as there was an adequate remedy at law; (3) in applying the scaling process under the Juul law to the tax levies of the Highland Park East Park District, the city of Highland Park and the county of Lake;

(4) in finding that the item in the tax levy ordinance of the Highland Park East Park District for salaries was null and void; and (5) in admitting evidence offered by appellee.

None of the appellants except the Deerfield-Shields High School District stood by their demurrers but answered the bill after their demurrers were overruled. They therefore waived all right to assign error in that particular, and only the high school district is interested in that question. The high school district is not interested in the question of alleged illegal taxes by reason of the failure of the county clerk to scale the taxes under the Juul law, as such scaling process did not apply to its taxes and was not held to so apply by the court. The high school district had no interest in the matters assigned in the fourth and fifth assignments of errors. We may further add that there is no merit in the claim of either the fourth or fifth assignment of errors, and that all the taxes complained of in the bills of complaint are illegal for the reasons specified.

Where several parties separately appeal or bring error or complain of errors which do not affect all of them or which affect them severally and not jointly, the rule is that their assignments of errors not only may but must be several and not joint. An assignment of errors is regarded as a declaration and each assignment as a count of a declaration, and a joint assignment must set forth error available to all who join in it. The rule is generally that if the assignments of errors are not good as to all they are not good as to any. This rule, however, does not apply where the judgment is a joint judgment and where an error is assigned that is sufficient to reverse the judgment as to one or as to all of the appellants. The same rule will apply as to any error assigned that is sufficient, if sustained, to reverse as to any one or all of the appellants. Familiar examples would be where the court has no jurisdiction of the subject matter or where the judgment or decree cannot be sustained for want of necessary parties. *Greenberg v. Peo-*

ple, 125 Ill. App. 626; *Greenman v. Harvey*, 53 Ill. 386; 3 Corpus Juris, 1352.

Under the general assignment of errors it is argued by appellants that the bill of Hawkins was multifarious. The method of raising the objection of multifariousness or misjoinder which prevails in the greatest number of jurisdictions is by demurrer, and the rule in this jurisdiction is, that if the objection of multifariousness is not raised by demurrer it is waived, and it is entirely in the discretion of the court as to whether or not such an objection will be considered when raised by answer. (*Risser v. Patton*, 232 Ill. 353; *Labadie v. Hewitt*, 85 id. 341; *Barnes v. American Brake-Beam Co.* 238 id. 582.) Only one of the appellants, the high school district, properly raised this question by demurrer, and it lost its right to raise the question in this court by joining in the assignment of errors with the other appellants, who have no right to raise it. This error will therefore not be considered.

The only error assigned and argued and not waived is the one that the court had no jurisdiction of the subject matter because the complainant Hawkins had an adequate remedy at law. This suit was not prosecuted by Hawkins as the sole complainant but also on behalf of all the other tax-payers of the city of Highland Park. The lower court had jurisdiction of the subject matter upon the further equitable ground that the entertaining of the bill will avoid a multiplicity of suits. The tax-payers of said city have already prosecuted one lawsuit to evade the illegal taxes occasioned by the unlawful act of the board of review in increasing the assessor's assessment thirty per cent, and the taxing authorities in 1920 refused to abide the decision of the court in 1919, which was affirmed by this court. It would require a multiplicity of suits by the taxing authorities to collect the illegal taxes of 1920 had the tax-payers declined to resist the taxes until sued. Where the tax is unauthorized by law this court has frequently held that it

is the duty of a court of equity to interfere, especially when the recovery of the tax would necessitate a multiplicity of suits. (*Drainage Comrs. v. Kinney*, 233 Ill. 67.) Hawkins and others who are interested in the prosecution of the bill tendered the taxes legally due to the collector, who particularly informed them that under no circumstances would he accept less than the entire taxes assessed, including the illegal taxes, and that there was no use for them to make tenders of the taxes which they claimed were all the taxes legally collectible. It is immaterial, under such a refusal, that some of the offered tenders were not legal tenders because made by checks or otherwise.

The decrees of the circuit court are affirmed.

Decrees affirmed.

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